

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

BETWEEN

BO
Applicant

AND

DE
Respondent

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

DECISION

Background

[1] BO (the Applicant) and her husband separated at the end of January 2011, after a relationship of approximately eight years. They had two small children, and owned their own property as well as other typical family assets. In 2005 the couple had entered into a Relationship Property Agreement,¹ which provided for the husband to retain some land and a house as his separate property. That land was subsequently subdivided and the couple built and lived in a family home on the rear section.

[2] After they separated the husband was the first to seek legal advice. He instructed DE (the Practitioner) who, in mid-February 2011, sent a letter to the Applicant at an address provided by her client, which was understood to be her residential address. When the letter was returned, marked by NZ Post as “gone no address”, the Practitioner asked her client for an alternative address, and he provided the Applicant’s work email address.

[3] This letter, as regards to both content and the manner of its delivery to the Applicant’s work email, eventually became the subject of a formal complaint against the

¹ Also described in correspondence as a “Contracting Out Agreement”.

Practitioner.

Standards Committee decision

[4] The Standards Committee considered the complaint and concluded that the Practitioner's actions did not raise any professional standards issues that justified a finding of unsatisfactory conduct. In particular, the Standards Committee held that:²

...The professional obligations of a lawyer are to promote and protect the interests of their client and there is no general professional duty towards another party who is not a client. Nor does an opposing lawyer owe the other party, who is also represented by their own lawyer, a duty of care.

[5] The Standards Committee decided to take no further action on the complaint pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act). Section 137 of the Act allows a Standards Committee to take no further action on a complaint pursuant to s 138, as an alternative to inquiring into a complaint. A Standards Committee may dismiss a complaint at the early pre-inquiry stage if having regard to all of the circumstances of the case, the Standards Committee considers that further action is unnecessary or inappropriate.

Review

[6] The Applicant sought a review, claiming that the Standards Committee did not cover all of the issues of her complaint. She sought an acknowledgement that the Practitioner was unprofessional and vowed to take her complaint "as far as I can".³ She also sought compensation.

[7] The Practitioner relied upon the submissions previously provided to the Standards Committee.

Role of the Legal Complaints Review Office

[8] The role of the Legal Complaints Review Officer (LCRO) on review is to reach her own view of the evidence before her. Where, as here, the review is of an exercise of discretion, it is appropriate for the LCRO to exercise particular caution before substituting her own judgement for that of the Standards Committee, without good reason.

² Standards Committee decision dated 9 October 2012 at [10].

³ Application for review to LCRO (14 November 2013) at part 8.

Hearing on the papers

[9] Both the Practitioner and the Applicant have consented to this review being undertaken on the papers pursuant to s 206 of the Act. This process allows me to conduct the review on the basis of all the information available if I consider that the review can be adequately determined in the absence of the parties.

Discussion

[10] I have had the benefit of considering all of the material that was provided to the Standards Committee, as well as the Applicant's submissions in support of her review. I have read all of this material, carefully.

Complaint and response

[11] The complaint to the Lawyers Complaints Service (sent some 17 – 18 months after settlement of issues between the parties) included a concern that the Practitioner had sent an email to the Applicant's workplace which contained personal and sensitive information relating to the separation of the Applicant and her husband.

[12] The Applicant was furious at receiving an intensely private, embarrassing and (in her view) defamatory letter by means of her work email address. She said that the email (and attachment) became the property of her employer, and others might have access to it.

[13] The Applicant instructed a lawyer to respond to the letter – both as to the manner in which it was sent, and its contents. She demanded an apology for the inappropriate use of her work email address. She also vigorously denied the suggestions (in the letter) about alcohol abuse and gambling. Her lawyer also described the comments as "defamatory",⁴ and wondered whether an apology from the Practitioner was in order.

[14] Further complaints alleged delays, misunderstandings, inappropriate correspondence and the Practitioner's general lack of professionalism.

[15] The Practitioner replied that all correspondence was restrained, responded to within reasonable timeframes and consistent with her client's instructions. She noted that the Applicant was not her client.

[16] There were difficulties along the way in the parties resolving matters and I noted that the Applicant was legally represented for the majority of the settlement

⁴ Letter from BO's lawyer to the Respondent (2 March 2011).

negotiations. However the Applicant considers that the Practitioner was responsible for many of the difficulties in achieving a prompt settlement, and examples were included in her complaint.

Email to the Applicant's work

[17] The complaint concerned the fact that the Practitioner had sent an email to the Applicant's work address, with the further question (on the Applicant's part) about the truthfulness of the Practitioner's explanation that the original letter was returned by NZ Post.

[18] The Practitioner's client (the husband) had provided the postal address, and I accept the Practitioner's explanation about the returned letter.

[19] The Practitioner's client also provided the alternative email address. At the time the Applicant worked for a substantial public company. The letter (sent as an attachment) made references to separation, the Family Court, counselling, and the husband's concerns about the Applicant's alcohol abuse and gambling. It did not include a scan of the Family Court counselling information.

[20] When the Applicant's distress was brought to the Practitioner's attention by her own lawyer, the Practitioner apologised if receiving such a letter at work caused the Applicant any stress.

[21] There is nothing to indicate that the Practitioner intended to embarrass the Applicant.

[22] The Conduct and Client Care Rules that need to be considered are:⁵

Rule 2.3 A lawyer must use legal processes only for proper purposes. A lawyer must not use, or knowingly assist in using, the law or legal process for the purpose of causing unnecessary embarrassment, distress or inconvenience to another person's reputation, interests or occupation.

Rule 10.0 A lawyer must promote and maintain proper standards of professionalism in the lawyers dealings.

Rule 12.0 A lawyer must, when acting in a professional capacity, conduct dealings with others, including self-represented persons, with integrity, respect, and courtesy.

⁵ Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[23] Also to be considered in the overarching standard set out in s 12 of the Lawyers and Conveyancers Act 2006 which is conduct that would be regarded by lawyers of good standing as being unacceptable. The review question is whether in sending the email to the Applicant's place of work breached acceptable professional standards.

[24] In a work place setting there is a risk that others might have access to an individual's email address, e.g. a manager, a co-worker or personal assistant. Most organisations have policies concerning private emails or access by others in the organisation, but seldom would emails be wholly inaccessible by someone other than the intended recipient. In this case there is no suggestion that anyone other than the Applicant actually accessed the email, and it is understood that the complaint essentially concerns the possibility that a third person might have done so.

[25] Although the Practitioner sent the email as instructed by her client, a lawyer cannot act in breach of professional rules at the direction of a client.

[26] It would obviously have been prudent for the Practitioner in that situation to have considered the possibility that the email might be accessed by someone other than the intended party. That this did not in fact occur here does not detract from the concern about the potential risk that it might have done, and arguably that this risk remains.

[27] Whether the sending of a letter could be described as 'a legal process' is arguable, but materially there is nothing to indicate that the Practitioner intended that the Applicant be embarrassed or distressed in respect of her occupation. There is nothing to indicate that the Practitioner had considered this risk. There is also the evidence that the Practitioner had first tried to send the letter to the Applicant at her residential address. I conclude that the Practitioner's only intention was to ensure that the Applicant received the letter.

[28] No criticism arises only because a lawyer emails an individual's workplace as such. For example, no criticism would arise if in this case the Practitioner had emailed to say that she acted for the Applicant's husband and sought a contact address to send correspondence (even adding that a failure to respond could result in the correspondence being sent to that email). The objection rises in this case because without notice the email included an attached letter containing highly personal and/or sensitive information.

[29] This issue is important. In this technological age, email is a common and accepted method of exchanging correspondence. At the same time there are clear

risks that through this process highly personal information might be accessible to persons who should not be privy to it.

[30] There is a 'best practice' argument for a view that lawyers need to consider and have regard to the consequences of actions they take, and a moment's thought to the risk would quickly lead a lawyer to perceive the potential risk that information might come into the possession of unintended parties. For this reason it is relevant to have referred to the above professional standards and the applicable Rules.

[31] The reason why I decline to make a disciplinary finding in this case is that the very fact of emails having incrementally (and perhaps surreptitiously) become so common a means of communication may have resulted in the associated risks being overlooked as a specific element of professional standards. The present case brings to the fore the importance of this topic requiring further and principled discussion which might best be pursued by the NZLS with its members. In particular I do not consider it appropriate that an individual lawyer should, by means of the disciplinary framework, become the example to set the standard of what amounts to proper standards of professionalism.

[32] The internet has opened new avenues for communication, and with it new difficulties and risks arise. How the risks are to be calculated is not always obvious, but lawyers would do well to consider the possibility that an emailed letter containing highly personal information might fall into the wrong hands if emailed to the workplace of the addressee.

Content of the emailed letter

[33] Both the Applicant and her lawyer regarded aspects of the Practitioner's email as "defamatory".⁶ Undoubtedly the comments were hurtful, but they could not be considered defamatory in the legal sense.

[34] Disputes of this nature will almost always involve parties exchanging complaints and criticisms, through their lawyers. Unless a lawyer making allegations infringes the requirement to act professionally in their dealings, then there can be no professional standards issues arising when robust correspondence critical of another party, is sent.

[35] Those negotiations were at times tense; each party made allegations and counter allegations against the other. On some issues they were resolute; on others, more conciliatory. Proceedings were never actually issued, and a privately arranged

⁶ Above n4.

mediation occurred towards the end of 2011 which resulted in all matters being settled. The Applicant was nevertheless highly critical of the way that the Practitioner dealt with the childcare and property issues, in particular the time it took for settlement to be achieved.

[36] It is relevant to note that the Practitioner acted for the Applicant's husband. The Applicant had her own lawyer. Negotiations between the parties' lawyers were at times forthright, and the some of the issues were difficult. Young children were involved. Feelings between the couple ran high. The Applicant would argue that the tone for the future negotiations was set when the Practitioner emailed her at work, making untrue and potentially embarrassing allegations about her. She believes that the Practitioner's delays, poor advice, insensitivity and a general lack of professionalism caused both her and her husband to spend more than was necessary on legal fees.

[37] No complaint against the Practitioner has been made by her own client in connection with her representation of him. The Practitioner's duty was to her own client. Except in very limited circumstances (that do not apply here) a lawyer owes no duty to a third party, except to the extent of the professional courtesies outlined in the above Rules. Lawyers in these instances must fearlessly and professionally advocate for their client's interests, and it is not unusual for one party to have a low opinion of the opposing lawyer.

[38] In my view the Standards Committee was right in concluding that no professional standards issues arose.

Other Complaints

[39] Additional complaints against the Practitioner may be summarised as follows:

- Delays and lack of responses;
- Misunderstandings;
- Mis-communications;
- Issues not addressed;
- Unavailability at crucial times;
- Tone of correspondence;
- Inappropriate and incorrect advice by the Practitioner to her client; and

- Failure to consider the couple's children.

[40] The list is comprehensive. The Applicant asserted that because of all of these shortcomings, she and her lawyer spent much more time negotiating property and childcare arrangements than should have been necessary; it should have taken half the time for half the cost. The outcomes sought are compensation (presumably reimbursement of some of her legal fees), that the Practitioner apologises to her and is "held accountable".⁷

[41] I have carefully reviewed the correspondence provided by both the Applicant and the Practitioner. It is important to restate that the Practitioner's duties were owed to her own client, and not the Applicant. The Applicant had her own legal representation. It is not necessary to look at each item of correspondence or complaint separately and form a separate judgment about each. This was an on-going matter, where issues came and went – such is the nature of settlement negotiations in this area. Looking at the correspondence in the round provides a sufficient basis upon which to assess whether the Practitioner was unprofessional or otherwise conducted herself unsatisfactorily in relation to the Applicant.

[42] The general tone of the correspondence from the Practitioner is not in my view unprofessional or unsatisfactory. It was robust when it needed to be; it was clear and it was appropriate. There were delays, though none which generated any serious rebuke from the opposing lawyer. Not all issues were addressed at once; again, no serious rebuke. The correspondence has all the hallmarks of a lawyer forcefully advocating on behalf of her client. Indeed, correspondence from the Applicant's own lawyer to the Practitioner was similarly forceful when it needed to be.

[43] Both lawyers were appropriately robust in acting for their clients and in dealing with each other. Equally, each was conciliatory when necessary. None of the correspondence is especially remarkable, given that the lawyers were dealing with clients who were understandably upset at the situation they found themselves in. I cannot see any professional standards issues arising in connection with the Practitioner's dealings with the Applicant.

Decision

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

⁷ BO's complaint to NZLS (19 June 2012).

DATED this 13th day of September 2013

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:

BO as the Applicant
DE as the Respondent
DF as a related person or entity
The Wellington Standards Committee
The New Zealand Law Society
Secretary for Justice