

**LEGAL COMPLAINTS REVIEW OFFICER  
ĀPIHA AROTAKE AMUAMU Ā-TURE**

[2022] NZLCRO 014

Ref: LCRO 136/2021

**CONCERNING**

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

**AND**

**CONCERNING**

a determination of the [Area] Standards Committee [X]

**BETWEEN**

**YL**

Applicant

**AND**

**OB**

Respondent

**DECISION**

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

**Introduction**

[1] Ms YL has applied for a review of a decision by the [Area] Standards Committee [X] to take no further action in respect of her complaint concerning the conduct of the respondent, Mr OB.

**Background**

[2] Ms YL separated from her husband around 7 July 2020.

[3] She instructed a lawyer to assist her with resolving issues arising from the separation.

[4] In early October 2020, Ms YL was dissatisfied with the representation she had received from the lawyer instructed, and on 14 October 2020, engaged Mr OB to represent her.

[5] Mr OB's instructions were confined to providing advice on relationship property and spousal maintenance issues.

[6] Mr OB filed an application for legal aid on 20 November 2020. A grant of aid was approved on 16 December 2020.

[7] In October 2020, Counsel for Ms YL's husband (Mr EH) had forwarded a proposal for settlement of relationship property issues to Ms YL's lawyer.

[8] On 28 January 2021, Ms YL forwarded correspondence to Mr OB, in which she raised concerns about a number of matters. Ms YL expressed disappointment that Mr OB:

- (a) had failed to advise that her legal aid grant had been approved; and
- (b) had made representations to counsel for her husband which had not been discussed with her; and
- (c) had been seemingly prepared to acquiesce to a settlement offer that she was not happy with; and
- (d) had compromised her position by failing to attentively and responsively manage her case.

[9] Ms YL informed Mr OB, that she had received advice from a number of quarters that she should be lodging an application for a protection order.

[10] Mr OB responded to Ms YL with indication that he was unable to continue to act for Ms YL whilst she was expressing reservations about the service he had provided for her.

[11] Discussions then took place between Mr OB and Ms YL, and it appears to be the case that the concerns that Ms YL had raised were addressed to her satisfaction. On 28 January 2021, Ms YL wrote to Mr OB to inform him that she did not wish to pursue a claim against him, and that she did not require Mr OB to seek independent legal advice.

[12] On 4 February 2021, Ms YL's husband was issued with a police safety order, that order naming Ms YL as a protected person. Counsel for Ms YL's husband provided an immediate response in which argument was advanced that there was no reasonable

or proper basis for Ms YL to have sought the protection of a safety order. Concern at the steps taken by Ms YL prompted Mr EH's partner to step back from child support and maintenance arrangements that had been agreed post separation.

[13] Ms YL turned her attention to filing an application for a protection order. Ms YL was particularly concerned that immediately following separation, Mr EH had bombarded her with a number of emails and uninvited gifts. The emails were sexual in nature, unwanted by Ms YL, and considered by her to be harassing in their nature.

[14] On 10 February 2021, Ms YH provided Mr OB with a folder containing the offending emails from Mr EH. This folder was described by her as comprising the "sex emails".

[15] On 8 March 2021, Mr OB and Ms YH had a lengthy telephone discussion. The call lasted 53 minutes. It is accepted by both Mr OB and Ms YL, that the majority of the lengthy telephone discussion, focused on the "sex emails".

[16] Shortly following this discussion, Ms YL took steps to engage fresh counsel.

#### **The complaint and the Standards Committee decision**

[17] Ms YL lodged a complaint with the New Zealand Law Society Complaints Service (NZLS) on 10 March 2020. The substance of her complaint was that Mr OB had:

- (a) delayed in filing her application for legal aid and neglected to advise her when the grant had been approved; and
- (b) had failed to respond to various request for information; and
- (c) had been unresponsive in promoting attempts to settle property issues; and
- (d) had acted without instructions; and
- (e) had conducted himself inappropriately and unprofessionally in the course of a telephone conversation.

[18] The Standards Committee determined that the primary scope of its inquiry should be directed to concerns that Mr OB had behaved unprofessionally in a telephone discussion he had had with Ms YL on 8 March 2020.

[19] Mr OB responded to Ms YL's complaint on 16 April 2021. He submitted that:

- (a) his initial advice to Ms YL, after reviewing emails and documents that he had initially been provided with, was that he considered she had been soundly advised by her existing lawyer, and that it may be advantageous for her to give consideration to remaining with her lawyer; and
- (b) it was his serious recommendation to Ms YL that she apply for a protection order; and
- (c) Ms YL was adamant that she did not wish to make an application for a protection order; and
- (d) it had taken some time to gather the financial information necessary to complete a legal aid application; and
- (e) he accepted that he had not advised Ms YL that her legal aid application had been successful, but understood it to be the case that legal aid would have informed Ms YL as to the outcome of her application; and
- (f) in discussions with Ms YL around mid-January 2021, he had made it clear, that he required precise instructions from her as to what her objectives were particularly with respect to advising a spousal maintenance figure that she would be happy with, but Ms YL had not come back to him with the information requested; and
- (g) following a discussion between himself and Ms YL which addressed concerns that Ms YL raised about his representation, agreement was reached that he would continue to represent Ms YL and she confirmed the amount she was seeking by way of spousal maintenance; and
- (h) on 5 February 2021, he received notice that a police safety order had been issued in Ms YL's favour; and
- (i) in the course of a lengthy meeting with Ms YL on 10 February 2021 (a support person for Ms YL in attendance), Ms YL had provided him with two folders of information, one of which was titled "sex emails"; and
- (j) Ms YL's instructions were to forward a copy of those emails to the other party but those instructions subsequently changed; and
- (k) Ms YL informed him that a draft affidavit for a protection order would be provided to him as soon as possible; and

- (l) Ms YL's account of the lengthy conversation that took place on 8 March 2021, was in large part accurate, but frequently referenced matters "out of context"; and
- (m) he rejected that he had been drinking prior to or during the 8 March conversation, and advised that if at any stage in the conversation he had been difficult to understand, that would likely have arisen as a consequence of his hay fever, or alternatively having to rest his phone against his shoulder when working on his computer; and
- (n) it was likely (and unfortunate) that he had uttered the phrase "for fucks sake" in the course of the conversation, but the comment was likely prompted by the difficulties he was experiencing with his eyes running as a consequence of his hay fever; and
- (o) some time was spent in the course of the discussion addressing possible strategies; and
- (p) Ms YL instructed that she wished to proceed with all applications, including an application for a protection order; and
- (q) Ms YL was advised that if an application was to be made for a protection order, it would be necessary for her to disclose not only the evidence that supported her position, but any evidence that would not be in her favour; and
- (r) the "sex emails," whilst numerous, were sent within a limited time frame of approximately five weeks; and
- (s) hence the need for him to ensure whether these emails were indicative of a pattern of behaviour throughout the relationship; and
- (t) aware of the need for sensitivity with his questioning, most questions asked were prefaced with the phrase "I'm sorry to ask this (or again sorry to do so) but...;" and;
- (u) the thrust of his questions had been to establish whether the conduct referenced in the email trail was reflective of conduct that had occurred in the course of the relationship, and whether it was conduct that had been encouraged in any way by Ms YL; and

- (v) he had specifically questioned Ms YL about a specific sexual practice and had looked at most of the links referenced in the email chain, together with the website “porn hub”; and
- (w) the conversation did discuss sex workers, but from the context that Ms YL had raised concern that her former husband had engaged sex workers.

[20] Mr OB concluded his submission with indication that it had been unwise to conduct such a sensitive discussion over the phone. Of that, he said this;

My clear lesson is that I should never have had such a difficult conversation other than in person as it is simply impossible to see how the other party might be reacting when talking over the phone. I will not be making that mistake again. Equally obviously my management (or mismanagement) of that conversation caused significant distress to Ms YL. That is something I certainly never wanted for which I sincerely apologise.

[21] Ms YL provided a brief response to Mr OB’s reply to her complaint on 6 May 2021. She submitted that;

- (a) She stood by the allegations she had made against Mr OB; and
- (b) she considered that Mr OB had “downplayed” what had occurred in the course of their discussion; and
- (c) the steps she took immediately after the conversation in reporting her concerns to her sister, the Police, SASH and her newly instructed lawyer, served to reinforce the extent of her concerns.

[22] In advancing its investigation, the Committee sought further information from Mr OB, in particular, clarification as to:

- (a) the nature and scope of the instructions received; and
- (b) clarification as to whether he had sought responses from Ms YL, in respect to specific questions (identified by the Committee) relating to intimate aspects of her marriage with Mr EH; and
- (c) whether the telephone discussion of which Ms YL had made complaint took place over a period of approximately 53 minutes, and if so, explanation for the length of the phone call.

[23] Mr OB responded to the Committee’s request on 29 May 2021. He advised that:

- (a) In response to the Committee's request for clarification as to whether he had addressed particular questions to Ms YL the answer was yes, but he had not made inquiry of Ms YL as to whether she had enjoyed any of behaviours identified by the Committee; and
- (b) the focus of his inquiries were to confirm that the intimate matters addressed in the emails were not welcomed by Ms YL; and
- (c) questions asked of Ms YL were necessary to ensure that he had met his obligations under rule 308 of the Family Court Rules 2002; and
- (d) his inquiries proceeded from a context where Ms YL had failed to provide him with evidence to support an application for a protection order other than her general advice that abuse had occurred in the relationship; and
- (e) he was concerned that none of the emails provided recorded the address of the sender (this in contrast with other emails that had been sent by Ms YL's former husband); and
- (f) his line of questioning was framed to determine whether the emails reflected what had occurred in the course of the parties' relationship; and
- (g) whilst he did not put the question directly to Ms YL, he had concerns as to the authenticity of the emails; and
- (h) substantial time had been spent during the 8 March conversation, discussing spousal maintenance issues.

[24] The Standards Committee delivered its decision on 19 August 2021.

[25] The Committee determined, pursuant to s 138(2) of the Lawyers and Conveyancers Act 2006 (the Act) that no further action on the complaint was necessary or appropriate.

[26] In reaching that decision the Committee concluded that:

- (a) whilst Mr OB could have "perhaps progressed matters more speedily", it did not consider that Mr OB had been responsible for undue delay; and
- (b) whilst Mr OB had made an error of judgement in discussing intimate material with Ms YL over the phone in circumstances where Ms YL had been the subject of alleged sexual abuse, the error did not merit a disciplinary response.

**Application for review**

[27] Ms YL filed an application for review on 28 August 2021.

[28] She submits that:

- (a) the Standards Committee had failed to provide evidence of clear reasoning for the decision reached; and
- (b) the decision was insensitive given the gravity of the complaint; and
- (c) Mr OB had taken advantage of her situation and acted in an unprofessional manner; and
- (d) Mr OB's actions had undermined her position, which had resulted in a less than favourable outcome in the separation proceedings; and
- (e) Mr OB's actions in making inappropriate, inaccurate and unauthorised statements to the other party in the course of the proceedings had undermined her position; and
- (f) Mr OB's conduct had been unlawful; and
- (g) she should not be required to meet any financial obligations to legal aid.

[29] Mr OB was invited to comment on Ms YL's review application. He advised that he had nothing further to add to the responses previously provided to the Standards Committee. Mr OB indicated, that he was not intending to provide an invoice to Legal Aid for the services provided to Ms YL, for the sole reason that Ms YL was dissatisfied with the services he had provided.

**Hearing**

[30] A hearing, attended by both parties, proceeded on 26 January 2022.

**Nature and scope of review**

[31] The nature and scope of a review have been discussed by the High Court, which said of the process of review under the Act:<sup>1</sup>

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<sup>1</sup> *Deliu v Hong* [2012] NZHC 158, [2012] NZAR 209 at [39]–[41].



... the power of review conferred upon Review Officers is not appropriately equated with a general appeal. The obligations and powers of the Review Officer as described in the Act create a very particular statutory process.

The Review Officer has broad powers to conduct his or her own investigations including the power to exercise for that purpose all the powers of a Standards Committee or an investigator and seek and receive evidence. These powers extend to “any review” ...

... the power of review is much broader than an appeal. It gives the Review Officer discretion as to the approach to be taken on any particular review as to the extent of the investigations necessary to conduct that review, and therefore clearly contemplates the Review Officer reaching his or her own view on the evidence before her. Nevertheless, as the Guidelines properly recognise, where the review is of the exercise of a discretion, it is appropriate for the Review Officer to exercise some particular caution before substituting his or her own judgment without good reason.

[32] More recently, the High Court has described a review by this Office in the following way:<sup>2</sup>

A review by the LCRO is neither a judicial review nor an appeal. Those seeking a review of a Committee determination are entitled to a review based on the LCRO’s own opinion rather than on deference to the view of the Committee. A review by the LCRO is informal, inquisitorial and robust. It involves the LCRO coming to his or her own view of the fairness of the substance and process of a Committee’s determination.

[33] Given those directions, the approach on this review, based on my own view of the fairness of the substance and process of the Committee’s determination, has been to:

- (a) Consider all of the available material afresh, including the Committee’s decision; and
- (b) Provide an independent opinion based on those materials.

## **Discussion**

[34] The two issues to be addressed on this review are:

- (a) Did Mr OB fail to diligently and competently progress Ms YL’s case; and
- (b) Did the manner in which Mr OB conducted a lengthy telephone discussion with Ms YL on 8 March 2021, constitute unsatisfactory conduct on the part of Mr OB?

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<sup>2</sup> *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [2].

*Issue 1 – Did Mr OB fail to diligently and competently progress Ms YL’s case?*

[35] Ms YL made complaint that Mr OB had failed to diligently advance her case. She identified a number of instances where Mr OB had either failed to respond to a request from her to do something or failed to respond to a request of him to provide her with information.

[36] I have examined each of the instances identified by Ms YL in which she raises allegation of inaction on the part of Mr OB. Considered in their totality, they constitute complaint that Mr OB failed to conscientiously manage her file.

[37] The conduct rule most directly engaged, by this element of Ms YL’s complaint, is Rule 3 which provides that in providing regulated services to a client, a lawyer must always act competently and in a timely manner consistent with the terms of the retainer and the duty to take reasonable care.<sup>3</sup>

[38] In addressing complaint that he had on occasions failed to respond to specific request made of him, Mr OB in large part, did not take issue with Ms YL’s contention that he had, at times, failed to promptly follow up with request made of him.

[39] In considering complaint of alleged delay, the Standards Committee focused on Ms YL’s concern that Mr OB had failed to advise her that her application for legal aid had been successful.

[40] With respect to the Committee, focus on that specific issue, (and its subsequent conclusion that it did not consider that there had been untoward delay in progressing the file from the time that legal aid had been granted) did not comprehensively address Ms YL’s broader complaint that Mr OB had failed on a number of occasions to comply with request made of him to do something.

[41] However, on carefully considering each of the instances in which Mr OB is said to have failed to respond to requests made of him by Ms YL, I am not satisfied that the threshold is met to establish that Mr OB breached r 3.

[42] Complaint that Mr OB failed to act diligently must be considered in the context of an examination of the retainer in its totality, and in particular, with reference to the nature of the instructions received and the steps taken by Mr OB to implement those instructions.

[43] The retainer was relatively brief in duration.

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<sup>3</sup> Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008.

[44] Mr OB was first contacted by Ms YL around mid-October 2020.

[45] She had initially instructed the law firm [XG] Lawyers to act for her in relationship property and maintenance matters, following her separation from her husband.

[46] At the time Mr OB took over Ms YL's file, a proposal for settlement of relationship property and spousal maintenance matters was on the table.

[47] Mr OB says when he was first contacted by Ms YL, he made request of her to forward relevant documents to him so that he could review her case. He says that after doing so, he formed the view that Ms YL had been ably represented by the lawyer she had initially instructed, and that she should give serious consideration to staying with her lawyer. Mr OB considered that the settlement offer that had been proposed, was in the "ballpark" of what Ms YL could reasonably expect to achieve. Mr OB says that he provided Ms YL with "serious recommendation", to apply for a protection order.

[48] Mr OB's early indication to Ms YL that he considered it would be in her best interests not to switch lawyers together with his assessment that the settlement offer proposed was realistic, was appropriate advice for a lawyer to provide. His recommendation to Ms YL that it would not be in her interest to switch lawyers, gives indication that Mr OB was, as he was required to do, acting in what he perceived to be the best interests of his potential client, rather than in his own.

[49] I think it possible that there was, for a period of time in October 2020, a degree of uncertainty as to who was representing Ms YL.

[50] On 23 October 2020, the lawyer for Ms YL's husband emailed [XG] making enquiry as to whether they were still in receipt of instructions from Ms YL. This was met with response from [XG] Lawyers that they remained instructed, but further enquiry was made of the firm on 27 October 2020.

[51] It appears that Mr OB's instructions to act were confirmed towards the end of October 2020.

[52] Ms YL's legal aid grant was approved on 16 December 2020. She was critical of Mr OB for not informing her that her application had been successful. Mr OB concedes that he failed to advise Ms YL that her application had been approved. He says that he did not do so, as he understood that Ms YL was on holiday at the time he received notification of the grant, but in any event, it was his understanding that Legal Aid directly advised applicants as to the outcome of their applications.

[53] There was, as is not infrequently the case when legal aid applications are being prepared, need for Mr OB to refer back to Ms YL to clarify details relating to the financial information she had provided. The application was promptly lodged and managed expeditiously by Legal Aid. Mr OB's certainty in his instructions, would have been clarified at the point when the legal aid grant was confirmed.

[54] No disciplinary issues arise as a consequence of Mr OB failing to inform Ms YL that her legal aid application had been successful.

[55] I accept that Mr OB's failure to promptly respond to various matters identified by Ms YL was concerning for her, but I am not persuaded that Mr OB was responsible for any significant delays in progressing Ms YL's case.

[56] On 28 January 2021, Ms YL wrote to Mr OB expressing concern that Mr OB had communicated with opposing counsel, without first consulting her. She expressed frustration that Mr OB appeared to be advocating that she accept a settlement proposal that she was not happy with.

[57] In responding to those concerns, Mr OB informed Ms YL, that in the course of several telephone discussions with her, she had been made aware that he was awaiting a substantive response from her as to what she considered was an appropriate settlement/counter offer. He reiterated, that it was his view that the maintenance offer that had been submitted may present as the best outcome she would be likely to achieve. Mr OB expressed concern, that the issues raised by Ms YL raised the spectre of a possible professional conduct complaint and advised that he would be unable to advance her matters further, until such time as her concerns were addressed.

[58] The concerns raised by Ms YL were addressed by her in a telephone discussion with Mr OB, following which, Ms YL emailed Mr OB thanking him for "clearing the air", and confirming that she did not wish to pursue a complaint.

[59] On 13 February 2021, Ms YL forwarded correspondence to Mr OB in which she set out a comprehensive response to the settlement proposal which had been initially forwarded to her on 12 October 2020.

[60] I am satisfied, that whilst Mr OB had neglected to respond to some requests made of him by Ms YL, these oversights were relatively minor and had no significant consequence for progressing the substantive matters. It is clear that Mr OB was waiting on Ms YL to provide her considered response to the settlement proposal that had been received. Mr OB's capacity to advance matters was dependant on Ms YL providing clear instructions in respect to the settlement proposal that was on the table.

[61] I am also satisfied that Mr OB was in frequent communication with Ms YL. Mr OB explained that his office records provide evidence of approximately 150 –160 email communications between himself and Ms YL.

*Issue 2 – Did the manner in which Mr OB conducted a lengthy telephone discussion with Ms YL on 8 March 2021 constitute unsatisfactory conduct on the part of Mr OB?*

[62] Ms YL confirmed at hearing, that the issue of most concern for her, was the manner in which Mr OB had conducted the telephone discussion of 8 March 2021, during which, the issue of the unwanted emails she had received from her former husband in July and August 2021 had formed the main subject of discussion.

[63] Ms YL considered that Mr OB's exhaustive questioning of her on matters of a sensitive nature, had crossed the line. She believed that Mr OB's approach was unprofessional and reflected a degree of insensitivity to, and a lack of awareness of, the vulnerable position she was in.

[64] In July and August 2020, shortly after separation, Ms YL's husband had, over a short period of time, deluged her with emails. The content of the emails focused predominantly on matters of a sexual nature.

[65] Ms YL was not only troubled by the content of the emails, but by the volume of emails sent. She felt intimidated and disconcerted by the constant bombardment of emails.

[66] It is necessary to provide some context for the telephone conversation that took place on the afternoon of 8 March.

[67] Ms YL had endeavoured to make contact with Mr OB early in the day but had been unable to reach him. She left a message for Mr OB to call.

[68] Mr OB says that on arriving home late in the afternoon, he realised that he had overlooked calling Ms YL back and decided that he would call her from his home.

[69] With the benefit of hindsight, Mr OB considers that it was an error of judgement to call Ms YL from his home, and that it would have been preferable, bearing in mind the sensitive nature of the matters that were to be discussed, to have made the call from his office.

[70] I have a sense from the manner in which Mr OB described the circumstances in which the telephone conversation proceeded, that he was somewhat disorganised. He says that he was at the time suffering the effects of a bout of hay fever. He had

difficulties juggling the phone and managing his computer. He accepts that he uttered a profanity in the course of the conversation, prompted he says by irritation he was experiencing with hay fever symptoms.

[71] Ms YL says that there were occasions in the course of the conversation, where she concluded that Mr OB was not sounding particularly coherent. She formed a view that Mr OB may have been drinking.

[72] Mr OB is emphatic that he had not been drinking prior to his call with Ms YL. He says that he had phoned Ms YL immediately on his arrival home from work.

[73] It is not possible to draw any firm conclusions as to Mr OB's general demeanour. The only evidence I have before me, are the differing recollections of the two parties engaged in the conversation. But on the back of Mr OB's own evidence, it is reasonable to conclude that he was not particularly well-prepared to conduct a serious and important interview with his client. His concession that he was diverted to the point where he uttered a profanity in the course of the conversation, prompted he says by a degree of aggravation arising from his hay fever, indicates that he appeared, at least at times in the course of the conversation, to have been distracted.

[74] Attention then turns to the subject matter of the telephone call.

[75] Mr OB says that the conversation commenced with some discussion concerning matters relating to the property settlement and spousal maintenance issues.

[76] Ms YL's initial recollection was that the conversation had focused exclusively on the issue of her husband's emails, but on reflecting on the conversation, she agreed that Mr OB had commenced the discussion by raising the property and maintenance matters. It is Ms YL's view, that around 10 per cent of the conversation focused on the property issues.

[77] I think it probable that the conversation commenced with Mr OB addressing the property and spousal maintenance issues, then moved to the issues raised by the emails. It is accepted by both parties that the conversation was a lengthy one. It is not contested that the majority of time was devoted to discussing the emails.

[78] Mr OB says that his decision to extensively question Ms YL on the subject of the emails was necessitated by the fact that he had received instructions from her to file an application for a protection order. Her concerns regarding the emails would form a part of the evidence advanced to support the application. Mr OB emphasised his

obligation under the Family Court Rules 2002, to ensure that evidence to be presented for Ms YL was “tested” by him.

[79] At hearing, Ms YL stated that she had never instructed Mr OB to make an application to the court for a protection order.

[80] If that was the case, there would appear to have been no requirement or necessity for Mr OB to have questioned Ms YL about the emails.

[81] In response to Ms YL’s indication that she could not recall instructing Mr OB to file an application for a protection order, Mr OB stated that he was “absolutely instructed to file an application”. He said that Ms YL had advised him that she would prepare a detailed affidavit setting out the grounds for a protection order. Mr OB pointed to the brief notes he had made recording his conversation with Ms YL, in which he makes reference to making applications for a protection order and an order for interim spousal maintenance.

[82] The question as to whether Mr OB had been instructed by Ms YL to file an application for a protection order, is critical to determining the issue as to whether Mr OB had necessity to discuss the emails with Ms YL in such detail.

[83] I have carefully examined the correspondence between Ms YL and Mr OB, and correspondence between Ms YL and the lawyer she had instructed prior to Mr OB.

[84] It is clear that Ms YL considered that she had, during the course of the marital relationship, suffered abusive and controlling behaviours at the hands of her husband, of a sufficient degree of seriousness that would merit an application being made to the court for a protection order.

[85] But she was initially reluctant to make application for a protection order. Ms YL confirmed that she had not instructed the lawyer engaged before Mr OB, to apply for a protection order. Her preference was to endeavour to cooperatively settle property and maintenance matters with her former husband.

[86] Mr OB says, and I accept his evidence, that on first taking instructions from Ms YL, he had formed a view that Ms YL had grounds to make application for a protection order and had “seriously recommended” that she do so.<sup>4</sup>

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<sup>4</sup> Mr OB, correspondence to Complaints Service (16 April 2021).

[87] As time progressed, Ms YL became increasingly concerned about her husband's behaviour. She says that she received advice from both the Police and woman's refuge to seek a protection order.

[88] Mr OB says that in the course of his meeting with Ms YL on 10 February 2021, Ms YL informed him that she was in the process of preparing a draft affidavit to support an application for a protection order.

[89] Mr OB's recollection is supported by correspondence Ms YL had forwarded to Mr OB on 26 February 2021 in which she had advised Mr OB, that she was "working on a protection order".

[90] I am satisfied that Ms YL concluded that it was necessary for her to make an application to the Court for a protection order, but I think it likely the case that her intention initially was to complete the work that was needed for that application herself. But she was clearly discussing the possibility of an application with Mr OB.

[91] It appears likely that Mr OB's firm instructions to proceed with a protection order application, were received in the course of his telephone conversation with Ms YL on 8 March. The information on the file does not provide sufficient information to clarify as to whether Mr OB had, at any stage, sat down with Ms YL and explained to her the procedural steps that would need to be taken if a protection application was to be made, and clarified for her the evidential obligations on a party swearing an affidavit in support of an application for protection. I think it possible that conversation had not taken place. It would have been preferable if it had, as it would have been helpful to Ms YL, if she had a thorough understanding of the process a lawyer is required to undertake, when discussing with a client, the evidence intended to be adduced to support a protection order application.

[92] As noted, Ms YL complains that Mr OB was distracted and inattentive during the course of the discussion. She raised concern that Mr OB appeared at times during the interview, to be distracted by unsuccessful attempts to ignite his lighter. She says that his exasperation with his lack of success in being able to light his cigarette, prompted him to utter a profanity. She was also concerned that Mr OB may have been drinking.

[93] The difficulty Ms YL has in establishing this limb of her complaint, is that her concerns regarding Mr OB's manner, are, understandably as the conversation took place over the phone, unsupported by any other evidence, and supported only by her recollection of events.



[94] And that recollection is challenged by Mr OB. This is not to suggest that Mr OB's recall of events is to be accorded a greater degree of significance than that of Ms YL. To the contrary, his difficulty in providing response to allegation that he was incoherent and distracted during the course of the interview, confronts similar difficulty to Ms YL, in that he can provide no evidence to bolster his position, and can only respond to the complaint by providing his account of what he says took place.

[95] A complainant, in advancing a review application, is required to support their application with evidence to the required standard; in this case, the balance of probabilities.

[96] Ms YL carries the burden of establishing, on the balance of probabilities, that the allegations she makes concerning Mr OB's conduct are established. In other words, she must provide evidence which tips the scales towards it being more probable than not that Mr OB behaved inappropriately when taking instructions from Mr YL, and that his apparent level of distraction, was sufficient to constitute a breach of the relevant conduct rules.

[97] The conduct rules potentially engaged by these aspects of Ms YL's complaint include rule 3.1 and rule 10.

[98] Rule 3.1 provides that a lawyer must at all times treat a client with respect and courtesy and must not act in a discriminatory manner in contravention of section 21 of the Human Rights Act 1993.

[99] Rule 10 provides that a lawyer must promote and maintain proper standards of professionalism in the lawyer's dealings.

[100] I am not persuaded that Ms YL's concerns regarding Mr OB's general demeanour are sufficient to establish to the necessary threshold, that Mr OB had breached rules 3.1 or 10.

[101] Attention then turns to the concerns Ms YL had regarding Mr OB's comprehensive questioning of her in regard to the numerous emails her husband had forwarded to her in July and August 2020.

[102] These emails focused almost exclusively on matters of a sexual nature. The emails were inviting Ms YL to examine various porn sites. The emails informed Ms YL that her husband was exploring differing avenues for conducting his personal relationships. The emails were repeatedly seeking to draw Ms YL's attention to purchases that could be made in various adult shops, and constantly suggesting that her

husband would be purchasing her items from these shops. The emails referenced specific sexual practices that Mr YL's husband was considering. Interspersed with this, were repeated references by Ms YL's husband to indication that he was open to initiating a sexual relationship with several partners.

[103] There was much more in the emails, but the summary provided gives sufficient indication of the flavour and tone of the correspondence.

[104] The flurry of emails commenced around 12 July 2020 and ceased around 21 August 2020.

[105] Around 50 emails, all similar in tone and content, were dispatched in that period. On occasions, several emails would be forwarded on the same day.

[106] Ms YL found the content of the emails to be troubling and objectionable. The intensity and volume of the traffic was immensely disturbing for her.

[107] At the conclusion of her conversation with Mr OB, Ms YL says that she was so distressed and upset, that she felt impelled to phone her sister, the woman's refuge, and the Police.

[108] The purpose of her call to the Police, was to make a formal complaint against Mr OB.

[109] I invited Ms YL to clarify the nature of the complaint that had been made to the Police. She was unable to do so but indicated that she could provide the LCRO with a report from the Police if that was required.

[110] These events took place some time ago. There is no evidence to support suggestion that the Police, following receipt of Ms YL's complaint, felt compelled to speak to Mr OB.

[111] Whilst Ms YL was uncertain as to whether she had provided Mr OB with specific instructions to apply for a protection order, she accepted that if she had done so, that it would be necessary for Mr OB to question her about the emails, and that it would have been reasonable of him to have made inquiry of her as to whether some, or all of the sexual practices referenced in the email trail, reflected practices that had been present in the course of her marital relationship. Ms YL agreed that this line of enquiry whilst intrusive and unpleasant, would be necessary to ensure that her affidavit evidence provided accurate account of the events deposed to.

[112] But Ms YL considered that Mr OB's exhaustive questioning of her, in respect to virtually all of the emails, went too far.

[113] Ms YL complained that Mr OB failed to appreciate that the interrogation was embarrassing for her, failed to recognise that she was in a vulnerable position, and failed to recognise that it was inappropriate to address such sensitive matters over the phone. The matters should, says Ms YL, have been discussed in Mr OB's office, and in circumstances where she would have been given opportunity to have a female support person present.

[114] Mr OB accepts that he managed the conversation poorly.

[115] He was questioned as to why it was necessary for him to have expended considerable time trawling through a raft of emails questioning Ms YL on matters that he would have been aware would have had potential to cause considerable discomfort to her.

[116] It was put to Mr OB that his understandable need to identify as to whether the raft of issues addressed in the emails touched on matters that had been commonplace in Ms YL's marriage, could have been addressed in a single well directed generic question, thus avoiding need for Ms YL to provide response to every issue traversed in the emails.

[117] Mr OB immediately conceded that it would have been preferable to ask one or two questions of a general nature, rather than to systematically pick through the email trail. Of that, he said this:

In hindsight I have to agree I was just simply rolling through the emails. I handled the conversation very badly. It's not that the questions didn't need to be asked..... Ms YL did say that there was some minimal stuff.... It did not need to be by the book, I'm very sorry about that, I never meant it to be like that... I'm really sorry... I honestly am.

[118] This was a recognition from Mr OB of the sensitivity of the subject matter his questions traversed, and a sensible recognition by him, that Ms YL was being put in a difficult position.

[119] But the question is whether, in recognising the inevitable sensitivity of discussing delicate matters over the phone, and in appreciating that Ms YL was a very vulnerable client, Mr OB should have commenced and continued with the interview, and whether his decision to do so, raises any issues of professional conduct.

[120] It is important to consider the effect that Ms YL says Mr OB's questioning had on her.

[121] Ms YL says that she was severely traumatised by the phone conversation with Mr OB. As noted, she had felt compelled following the conversation to contact the Police, but she was unable to explain precisely what the concerns were that she had raised with the Police.

[122] Ms YL maintains that Mr OB's conduct had "weakened her resolve to progress matters", and that "Mr OB's conduct had directly resulted in her receiving a poor relationship settlement".

[123] With every respect to Ms YL, and I do not for one moment diminish the extent of her discomfort, but suggestion that her degree of distress was of such severity and consequence that it diminished her capacity to negotiate settlement of property and maintenance issues with her former husband, is quite unsupported by evidence.

[124] In the narrative advanced by Ms YL, Mr OB's conduct is said to have been so egregious that it directly impacted her ability to negotiate settlement terms with her husband.

[125] The process of negotiating property and maintenance issues following separation can frequently be extremely distressing for parties, but it is compellingly clear that the controlling and concerning behaviours that had contributed to Ms YL's distress had its genesis in behaviours that she had regrettably experienced over many years. It would be quite unrealistic to conclude that Mr OB's mismanagement of a single telephone conversation could, as contended for by Ms YL, be considered to have been so disturbing as to render her unable to continue to pursue efforts to achieve a fair settlement of her property and maintenance issues.

[126] There is no evidence advanced by Ms YL to support contention that she was unable to achieve the level of settlement to which she was entitled as a consequence of her being upset by her conversation with Mr OB.

[127] Throughout the time that Mr OB was instructed, Ms YL was becoming increasingly anxious and concerned with her husband's behaviour. She reached a point where she felt apprehensive for her safety.

[128] But those concerns must be considered in the context of Mr OB on first taking instructions, making what he described as "strong recommendation" to Ms YL to make an application for a protection order. Nor, despite the considerable safety concerns she had about her former husband, did Ms YL instruct the lawyer she first engaged, to lodge an application for a protection order.

[129] I accept Mr OB's evidence that he considered there to be something of a "disconnect" in the instructions he was receiving from Ms YL, in that whilst she was expressing grave concerns about her husband's behaviour, she appeared unwilling to take steps to apply for a protection order.

[130] Ms YL made complaint that Mr OB was encouraging her to accept the settlement offer proposed by her husband, and says that she was being pressured to participate in a round table meeting with her husband when it was her preference not to do so.

[131] But following a discussion with Mr OB on 28 January 2021, Ms YL wrote to Mr OB advising that she did not wish to go to court and informing him that she was receptive to attending a round table meeting with her husband.

[132] Mr OB conveyed that information to opposing counsel, and informed counsel that he would be on leave until 9 February.

[133] On the 4 February 2021, Ms YL instructed the Police to issue her former husband with a Police Safety Order. Mr OB was unaware these steps were being taken.

[134] Ms YL's husband's response to being served with the safety order was to withdraw arrangements that had been in place to make spousal maintenance payments, and to issue relationship property proceedings.

[135] It appears to be the case that Ms YL and her husband's attempts to resolve issues became increasingly acrimonious.

[136] On 26 February 2021, Ms YL advised Mr OB that she was being subjected to "continued harassment and bullying", and that the Police had recommended that another Police Safety Order be put in place.

[137] The situation further deteriorated, and the accusations being exchanged more acrimoniously personal in the period between 26 February and 8 March. Ms YL was accused of drinking excessively, this allegation supported by photographs that had been recovered (without Ms YL's consent) from a Facebook page. Accusation was made that Ms YL was mentally unwell.

[138] It is from this unfortunate context of increasing acrimony, and Ms YL's understandable indication that she was extremely stressed by the pressure she was under, that accusation that Mr OB was responsible for Ms YL securing a less favourable settlement must be assessed.

[139] Whilst I accept that Ms YL was upset following her telephone discussion with Mr OB on 8 March, I am not persuaded that Ms YL's settlement was compromised by the actions of Mr OB.

[140] There is no evidence produced by Ms YL to support suggestion that "but for" Mr OB reducing her capacity to continue to resolutely advance her case, a better outcome would have been achieved.

[141] On first taking instructions, it was Mr OB's view that Ms YL had been ably represented by her former lawyer, and that the settlement proposal that was on the table at the time he was instructed was realistic.

[142] Ms YL was critical of Mr OB for recommending that she accept the settlement that was on the table. But it was Mr OB's responsibility to provide his best advice on the settlement offered. If he considered that the settlement proposed was fair and reasonable, it was his responsibility to tell Ms YL that. It was not his job to encourage Ms YL to have unrealistic expectations of outcome.

[143] It is not uncommon when separated parties are endeavouring to resolve division of property, for parties to form a view that success or otherwise of outcome is directly attributable to the skill of the lawyers involved. Many lawyers will have heard tales from disgruntled clients that their client would inevitably have secured the relationship property settlement to which they were entitled, but for their lawyer being overwhelmed and outmanoeuvred by the overpowering aggression, acuity and ruthlessness of the lawyer on the other side.

[144] It is the case that in certain types of relationship property cases (generally those involving significant assets and the intertwining of personal, trust and business assets) that the skill and expertise of a particular lawyer can have an impact on outcome, but in the majority of "day to day" relationship property cases (as this was), the outcome is primarily influenced by the nature of the assets and the established and longstanding principles which underpin the Property (Relationships) Act 1976. The critical issue is valuation. Valuing the assets and quantifying the liabilities is the starting point.

[145] Mr OB recognised that the asset pool available for distribution was relatively modest. The marriage was of lengthy duration. The starting point would be equal division.

[146] Ms YL had been advised that her former lawyer considered that she had a strong basis to argue economic disparity, with possibility that she could achieve a 60/40 division, but this by reference to what the lawyer had calculated was a "relatively small

amount of matrimonial property". Ms YL was cautioned that advancing an economic disparity claim would incur significant legal costs as would pursuing a claim for spousal maintenance.

[147] On terminating Mr OB's retainer, Ms YL immediately instructed another lawyer. She says that on first meeting with this lawyer, the lawyer took steps to have a support person present, and that she felt comforted by the approach adopted. I take this to be an expression of confidence in her new lawyer.

[148] I accept that Ms YL was upset with the tenor of her conversation with Mr OB, but I do not conclude that her distress was of such significance as to have diminished her capacity to continue, with the assistance of her new lawyer, to negotiate with her husband. Her distress and discomfort cannot fairly or indeed sensibly be solely attributed to the actions of Mr OB. Ms YL says that she had been subjected through the course of a lengthy marriage to controlling and unpleasant behaviours at the hands of her husband, and that this behaviour continued after separation. Her distress and discomfort had its genesis in a much broader context of events than the single conversation with Mr OB.

[149] That said, it is my view that Mr OB mismanaged his conversation with Ms YL.

[150] Mr OB says that he had overlooked a message he had received to call Ms YL, hence his decision to call her on arriving home. It is my impression that Mr OB was not particularly well equipped to conduct business from home.

[151] He concedes that he was suffering the effects of hay fever. He had difficulty managing the phone and his computer. The notes he made of what was an important and highly relevant conversation were cursory and incomplete.

[152] Most significantly, he failed to appreciate that his persistent line of questioning on the subject of the email correspondence was causing discomfort to Ms YL. He failed to recognise what should have been obvious to a practitioner of his experience, that the discussion should have taken place "face to face" and with Ms YL having opportunity to have a support person present. The questioning went too far. It was unnecessary (as Mr OB concedes) to take Ms YL through the raft of emails. Whilst I accept that Mr OB did receive instruction from Ms YL to file an application for a protection order, I think it probable that Ms YL had been largely undertaking the task of preparing the information to support an application herself (whilst discussing the issue with Mr OB), and that firm confirmation of instructions for Mr OB to proceed was only provided to Mr OB on 8 March. I think it probable, that Ms YL would have felt less troubled, by Mr OB's line of questioning, if Mr OB had, when the question of the possibility of a protection order being

lodged was first raised, carefully explained to Ms YL the obligation he had to ensure that evidence to be put to the court was thoroughly discussed with her.

[153] Whilst I am satisfied that Mr OB could have managed matters better, I find myself in agreement with the Standards Committee's conclusion that Mr OB's errors of judgement did not merit a disciplinary response.

[154] In reaching that view I take particular account of the following.

[155] I am satisfied that Mr OB's decision to call Ms YL from his home rather than meet with her in his office contributed in part to the conversation being less organised and prepared than it otherwise would likely have been.

[156] I am also persuaded that Mr OB was not oblivious to the fact that the issues he discussed with Ms YL were extremely sensitive for her. His prefacing of each question with indication that he was apologetic for having to raise the issues was an attempt by him to render the process less confronting for her.

[157] Nor did Mr OB veer off track in explaining that it was necessary for him to make inquiry of Ms YL as to whether the matters referenced in the emails identified behaviours that had been commonplace in the marital relationship.

[158] His error was in failing to recognise that his extended questioning was causing distress to Ms YL.

[159] I also consider it relevant that Mr OB, both in his written submissions and in the course of the review hearing, was open in acknowledging that he had managed his conversation with Ms YL poorly. The apology provided to Ms YL at the hearing was sincerely proffered. Mr OB was genuinely regretful for the distress he had caused. I am satisfied that the experience of responding to Ms YL's complaint has been a salutary one for Mr OB, and that there is minimal chance of him repeating the mistakes made.

[160] Mr OB advised the LCRO that he had not filed an invoice with legal aid seeking reimbursement of costs incurred in representing Ms YL, nor was he intending to. Mr OB explains that his decision not to invoice for his services was prompted by the concerns that Ms YL had raised regarding the service he had provided.

[161] Mr OB's decision to eschew payment cannot, and does not, have relevance to the question as to whether he breached obligations owed to Ms YL, but his decision to refrain from seeking payment and thus avoid possibility of further cost to Ms YL, speaks well for Mr OB as to the degree of seriousness he has accorded both Ms YL's complaints and her review application.



*Anonymised publication*

[162] Pursuant to s 206(4) of the Act, I direct that this decision be published so as to be accessible to the wider profession in a form anonymising the parties and bereft of anything as might lead to their identification.

**Decision**

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

**DATED** this 28<sup>TH</sup> day of February 2022

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**R Maidment**  
**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:

Ms YL as the Applicant  
Mr OB as the Respondent  
[Area] Standards Committee [X]  
New Zealand Law Society  
Secretary for Justice