

LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

BETWEEN:

MARK OGILVIE

Appellant

AND

**LAW SOCIETY NORTHERN
TERRITORY**

Respondent

REASONS FOR DECISION

26 November 2009

1. The Complaint

1.1. Mark Ogilvie ("the Complainant") made a complaint in writing to Law Society Northern Territory ("the Law Society") concerning the conduct of Mark Hunter ("the Practitioner") an Australian legal practitioner as defined in section 6(a) of the *Legal Profession Act* (NT) ("LPA"). The complaint was made in accordance with section 471 LPA. It was received by the Law Society on 26 May 2008. It was dated 22 May 2008.

1.2. These were the written particulars of the complaint:

"Mark Hunter is my wife's lawyer. My wife and I have been separated since early April 2008. Mark Hunter has given Indah legal advice, including emails, personal visits from (sic) my wife and from himself to our residence. He has advised Indah, my wife on many legal matters. Mark Hunter and my wife are now romantically involved. Mark Hunter has told my wife he loves her. They are planning to consolidate and develop their relationship."

1.3. The Law Society notified the Practitioner of the complaint by letter dated 27 May 2008. The Practitioner responded by letter dated 30 May 2008 in these terms:

- “1. At all times my assistance to Mrs Ogilvie has been limited to giving her legal advice by way of assistance to a friend, without fee and as a private person (Barristers Conduct Rules, Rule 76);
2. Mrs Ogilvie has never been my “client” (Part 3.3 Legal Profession Act 2006);
3. Over the past two months I have facilitated Mrs Ogilvie obtaining legal advice in conference (two occasions) from a salaried lawyer at the NT Legal Aid Commission;
4. I have also facilitated Mrs Ogilvie obtaining urgent assistance from the NT Police, in respect of an assault upon her by Mark Ogilvie on 1 April 2008;
5. I believe Mr Ogilvie’s complaint is a ‘fishing trip’, and his complaint has not been instituted for a purpose recognized by Chapter 4 of the Legal Profession Act, 2006.

I respectfully submit that this complaint should be summarily dismissed, because it is lacking in substance (s478(1)(b)). Even if I was “romantically involved” with and “loved” Mrs Ogilvie; this complaint is not the type of complaint which the Society has power to deal with (s478(1)(h)).”

- 1.4. The Law Society wrote to the Practitioner on 3 June 2008. The letter stated: “a copy of your response will be forwarded to the complainant. A further period of 14 days will be provided to him in the event that he wishes to add anything further to the original complaint. Provided that his response does not raise any further issues, the matter will be considered by the Ethics Committee.”.
- 1.5. The Law Society wrote to the Complainant on 23 June 2008. The letter enclosed a copy of the Practitioner’s response and stated: “The matter will not (sic) be referred to the Ethics Committee for further considerations (sic) of your complaint”. The letter went on to discuss the courses of action open to the Ethics Committee. It is obvious from the other contents of the letter that “not” was intended to be “now”.

- 1.6. It would be understandable if the Complainant was confused by the Law Society's letter. In any event he sent a message back by email to Jacqueline Presbury (the Law Society's "Professional Standards and Ethics Solicitor") on 4 July 2008. In the message he complained that on 3 July 2008 the Practitioner had personally delivered an "email letter" dated 2 July 2008 to his home address together with the Practitioner's business card. A copy of the "email letter" is attached to these reasons (Attachment 1). The Complainant asserted that the contents of the letter were variously "foul", "intimidating" and "rude" and that the Practitioner's actions in personally delivering the letter were "very intimidating". The Complainant pointed out that the message was "extremely threatening" because whilst the Practitioner was a lawyer, he, the Complainant, did not have legal counsel, nor could he afford to retain legal counsel.
- 1.7. There was evidence that the Practitioner was involved in a close personal relationship with the Complainant's wife and that the Complainant wanted that relationship to cease. The tension between the Practitioner and the Complainant (obviously engendered by that relationship) created a fertile field for the escalation of hostility which became evident in their communications relating to the various complaints which the Complainant made about the Practitioner's professional conduct.
- 1.8. By a letter dated 30 July 2008 to the Law Society the Practitioner conceded that Attachment 1 was "abusive in tone"; he denied that it was threatening. The Practitioner took exception to a rather impetuous message dated 30 July 2008 to him from Ms Presbury, in particular this passage:
- "There are alarming statements made in that email to Mr Ogilvie. Some of the statements in the email indicate that you did give some advice to the complainant's estranged wife and therefore some of the language used in the email is inappropriate. If in fact this email was forwarded by you to Mr Ogilvie it brings the profession into disrepute. There are common law duties in this regard."
- 1.9. The Practitioner denied that in late May he had given legal advice to Mrs Ogilvie. He asserted that all his correspondence to the Complainant had been sent as a private person. Further, that in none of his correspondence

had he included any reference to his qualification as a lawyer; nor had he purported to communicate with the Complainant in his capacity as a lawyer.

- 1.10. The Practitioner wrote again to the Law Society on 6 August 2009. He mentioned that Mrs Ogilvie had sought urgent legal advice from him on the morning of Wednesday 28 May 2008. He had secured an appointment for her to meet solicitor Mary Allan later the same day.

2. Law Society's Decision

- 2.1. After completing its investigation the Law Society on 15 January 2009 dismissed the complaint stating that it was satisfied that there was no reasonable likelihood that the Practitioner will be found guilty by the Disciplinary Tribunal of either unsatisfactory professional conduct or professional misconduct: see section 498(b) LPA which informs the Law Society's decision in those terms.
- 2.2. The Law Society is required by section 488(1) LPA to investigate each complaint (except for certain complaints referred to in section 488(2) but the exception does not come into play in this case). It appears that the Law Society investigated the following complaints made by the Complainant against the Practitioner:

"Original Complaint

1. The practitioner breached his code of conduct, particularly in developing a personal relationship with the complainant's estranged wife whilst in fact being involved in a solicitor/client relationship;

Subsequent matters

2. In the course of his dealings with the complainant after the complaint had been lodged with the Society the practitioner sent to complainant an abusive and threatening email; and
 3. The practitioner has been less than frank in his dealings with the Society."
- 2.3. The succinct statement of the complaints quoted above has been extracted from the Law Society's Statement of Reasons dated 15 January 2009.

2.4. It will be useful to refer to the following reasons (amongst other reasons) given by the Law Society for its decision:

- “The practitioner admits that he was providing some legal advice or guidance to the wife but says that it was on a pro-bono basis. There is no evidence presented to contradict this statement.”
- “The provision of some form of legal advice, even on a pro-bono basis, would still, however, allow a conclusion that the wife was a “client” as defined within the Legal Profession Act, that is, she is someone to whom legal services have been provided.”
- “There is no provision of the Act or rule of professional conduct that prohibits the existence of personal, intimate relationships between legal practitioners and their clients. No doubt such relationships might bring with them the risk of errors of judgment, or less than objective legal advice. However, such consequences would only give rise to a conduct issue as contemplated [by] Part 4 of the *Legal Profession Act* where there is an act or omission by the practitioner in the course of that professional relationship that falls short of the standard of competence or diligence that a member of the public is entitled to expect, or if there is an act or omission that would justify a finding that the practitioner is not a fit and proper person to engage in legal practice.”
- “None of the cases, it seems, relating to whether a practitioner is a “*fit and proper person*” would support a contention that the practitioner’s romantic involvement or engagement in an affair with a person to whom he also imparted some legal advice or guidance on a pro-bono basis, makes him someone who is not a fit and proper person to engage in legal practice.”
- “The practitioner concedes his language in the email of 2 July 2008 was abusive. However, it is not considered his use of that language amounts to either unsatisfactory professional conduct or of (sic) professional misconduct.”

- “The email correspondence appears to be a private communication as asserted by the practitioner. Nowhere in the email correspondence does the practitioner use any words that give any indication he is in writing in the capacity of a legal practitioner. He does not sign off as a barrister, or include any information identifying the correspondence as emanating from his practice.”
- “As to the second limb of professional misconduct, being conduct whether or not connected with the practice of law as to whether the practitioner is a fit and proper person, the use of the language concerned here would, it is viewed, [*not*] lead to a conclusion that the practitioner is not a fit and proper person to practice law. It is rather an instance of intemperate language, in an emotionally charged personal situation, but the language used is the same as is commonly heard in many public settings on a regular basis.” [*Correction added. It is impossible to make sense of this paragraph without inserting the word “not” because, as we have already explained, the Law Society dismissed the complaints.*]

2.5. The Law Society did, however, caution the Practitioner on the grounds that:

- “Whilst the finding is that the abusive email was not sent in the practitioner's capacity as a legal practitioner, care should be taken in language used in such volatile circumstances, particularly where he has some personal involvement;
- Some of the practitioner's contradictory statements to the Society in relation to whether or not he was acting for the complainant's estranged wife, were less than satisfactory although not considered to amount to a breach of conduct;
- Whilst there has been no finding against the practitioner in relation to his dealings with the Society nevertheless the practitioner be reminded of his obligations when dealing with the Society.”

3. The Appeal

- 3.1. Section 506 LPA gives the Complainant a right of appeal against the decision of the Law Society. No objection has been taken by the Practitioner to the competency of the appeal.
- 3.2. Section 507(1) LPA provides that the Disciplinary Tribunal must hear the appeal by way of rehearing. Section 508(1) LPA provides that the parties to the appeal are the Complainant, the Practitioner and the Law Society. Section 508(2) LPA provides that the parties are entitled to appear at the hearing.
- 3.3. The Disciplinary Tribunal proceeded to hear the appeal on 17 August 2009. The parties were invited to attend the hearing but declined to do so. Instead it was agreed that the hearing would proceed by reference to the documents which the parties placed before the Disciplinary Tribunal. The relevant documents consist of communications between the parties and submissions made by the Complainant and the Law Society. The Disciplinary Tribunal acknowledges that it is bound by the rules of evidence in conducting the hearing (section 507(2) LPA) and mentions that, notwithstanding the informal nature of the hearing, it has kept that restriction constantly in mind.
- 3.4. In a letter dated 5/1/09 (it seems that the actual date of this letter was 5/02/2009), the Complainant wrote to the Law Society informing them that he wished to appeal to the Disciplinary Tribunal against the Law Society's decision. He stated, "I seek justice for the breeching (sic) of 'common law duties' and bringing the legal profession into disrepute by Mark Hunter." The Complainant's ground of appeal was simply that the Practitioner's language (in Attachment 1) was such as to bring the legal profession into disrepute. It seems that the allegation of a breach of "common law duties" was adopted by the Complainant from the passage quoted above in Ms Presbury's message dated 30 July 2008 to the Practitioner.
- 3.5. The material placed before the Disciplinary Tribunal contained an assortment of arguments and allegations. It has been necessary for the Disciplinary Tribunal to be careful to observe the distinction between the grounds of appeal and other matters alleged by the Complainant. Doing the best we can

with the material, the Complainant appears to have stated his grounds of appeal as:

- (a) Attachment 1 had the Practitioner's business card attached. Therefore, in sending Attachment 1, the Practitioner had used his professional position to attempt to intimidate the Complainant.
- (b) The Practitioner had entered into a sexual relationship with Mrs Ogilvie who was at the time his client.
- (c) The Practitioner was dishonest in his dealings with the Law Society.

3.6. We have carefully considered the large array of so-called grounds advanced by the Complainant and his submissions. To the extent to which the grounds listed above may be regarded as an incomplete statement, we inform the parties that we regard the above grounds as the only grounds worthy of consideration. The remaining grounds were misconceived and/or not put before the Law Society for investigation and were, for those reasons or on their face, patently hopeless.

3.7. We hasten to add that we would refute any suggestion that we reached a premature conclusion in relation to grounds (a), (b) and (c). We are merely of the view that they are worthy of further consideration. We have come to this view notwithstanding the Law Society's submission that the Complainant had given insufficient particulars or documentation to support the appeal. We regard the grounds of appeal as tolerably clear. Whether or not the documentation supports the appeal will be apparent from the reasons given below.

3.8. The Law Society made these additional submissions in response:

- 1. Attachment 1 did not have identifying marks such as would prove that it was from the Practitioner in his capacity as a barrister, nor did it include any identifying correspondence emanating from his practice.
- 2. The Practitioner's suggestion in Attachment 1 that the Complainant should refer the matter to the Law Society was made purely in the Practitioner's personal capacity.

4. Decision on Appeal

4.1. Section 511 LPA provides:

- (1) On hearing the appeal, the Disciplinary Tribunal must:
 - (a) if the appellant is the complainant:
 - (i) affirm the Law Society's decision; or
 - (ii) set aside the decision and direct the Society to start disciplinary proceedings in the Tribunal in relation to the whole or part of the complaint; or
 - (iii) set aside the decision and take action that the Society could take under section 499(2)....".

4.2. Section 499 LPA requires consideration having regard to section 511(1)(a)(iii). Section 499 is in these terms:

- "(1) This section applies if the Law Society:
 - (a) completes an investigation of a complaint against an Australian legal practitioner; and
 - (b) is satisfied there is a reasonable likelihood that the practitioner would be found guilty by the Disciplinary Tribunal of unsatisfactory professional conduct (but not professional misconduct); and
 - (c) is satisfied the practitioner is generally competent and diligent and that no other material complaints have been made against the practitioner.
- (2) The Society may do any or all of the following:
 - (a) publicly reprimand the practitioner or, if there are special circumstances, privately reprimand the practitioner;
 - (b) impose a fine on the practitioner of a specified amount.

4.3. Part 4.2 LPA refers to "Key Concepts".

Section 464 LPA provides –

"For this Act:

Unsatisfactory professional conduct includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner."

Section 465 LPA Provides –

"(1) For this Act:

Professional misconduct includes:

- (a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- (b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice."

4.4. We are of the opinion that the Law Society's decision is, in essence, correct and should be affirmed. Our reasons for reaching this conclusion are:

- (i) We agree with the Law Society that there does not appear to be any statutory provision, professional conduct rule or court decision such as would suggest that it is a breach of professional conduct for a legal practitioner to engage in an intimate relationship with a client. The cases on which the Complainant relies upon are of no assistance. One of them – *Hoile v Medical Board of South Australia* [1960] HCA 30 – concerns a relationship in a totally different setting (namely, a relationship

between a medical superintendent of a hospital and a nurse in the employ of the hospital). As the Law Society has observed, it may be unwise for a practitioner to enter into such a relationship with a client because it may compromise the practitioner's ability to carry out the requirements of the retainer in an objective manner but we are not concerned with questions of that sort in this case.

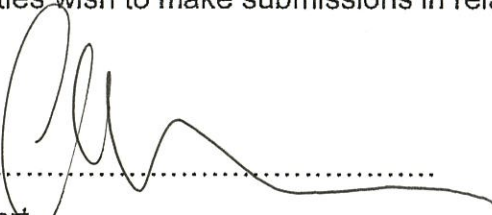
- (ii) We also agree with the Law Society that the provision of legal advice, even on a pro-bono basis would allow a conclusion that the recipient of the advice was a "client" as defined in section 4 LPA which includes "a person to whom or for whom legal services are provided". The Practitioner admitted giving Mrs Ogilvie "legal advice by way of assistance to a friend, without fee and as private person": see paragraph 1.3 of these Reasons. Legal advice comes within the ambit of the definition of "legal services" in section 4 LPA being "work done in the ordinary course of legal practice". Mrs Ogilvie was, therefore, the Practitioner's "client" for the purpose of Chapter 4 LPA which deals with disciplinary matters and complaints.
- (iii) We also agree with the Law Society that the terms in which Attachment 1 is expressed do not justify a finding of either unsatisfactory professional conduct or professional misconduct. Our reasons differ slightly from the Law Society's reasons in that we do not fully agree with the Law Society's observation that in sending Attachment 1 the Practitioner "does not... include any information identifying the correspondence as emanating from his practice". The Practitioner sent his business card with his message to the Complainant so there was a connection with his practice. However, we conclude that, in so doing, the Practitioner was providing his contact details in the event that the Complainant wished to make another complaint against him.
- (iv) Although the business card confirmed that the Practitioner was a legal practitioner, when used as it was used the card does not

establish that he was acting as a legal practitioner at the time. In sending the communication which appears as Attachment 1, it was obviously imprudent of the Practitioner to be seen to be goading the Complainant into making a further complaint against him. In that sense a connection with the Practitioner's legal practice can be seen. Nevertheless, it does not necessarily follow that the communication was sent by the Practitioner in the course of his practice as a legal practitioner. We have already found that his legal services for Mrs Ogilvie consisted of providing legal advice but there is no evidence that he was acting as a legal practitioner on her behalf. The Practitioner submits that the communication represented by Attachment 1 was forwarded in his capacity as Mrs Ogilvie's friend. In the absence of cogent evidence to the contrary we accept that submission.


- (v) It follows that the Practitioner's conduct occurred "otherwise than in connection with the practice of law". Having regard to section 465(1) LPA a finding of professional misconduct would be appropriate only if the conduct was serious enough to justify a conclusion that the Practitioner is not a fit and proper person to engage in legal practice. His use of intemperate language in the circumstances as described does not in our opinion justify such a conclusion.
- (vi) In advancing the third ground of appeal the Complainant relies upon considerations dealt with by the Law Society at pages 165 and 166 of its reasons. Those considerations were dismissed by the Law Society. The reasons supplied by the Law Society appear to be sound. Be that as it may, we do not consider that there is enough substance in this ground of appeal to warrant giving further attention to the Practitioner's conduct in his dealings with the Law Society.
- (vii) We are not aware of the basis upon which the Law Society felt that it was empowered to caution the Practitioner. However, the

Practitioner has not appealed against the Law Society's decision. In the absence of any argument from the parties on this point we expressly refrain from affirming this part of the Law Society's decision and invite further submissions if the parties would like us to give the matter further consideration.

4.5. The Complainant's appeal is dismissed. We will give further directions if the parties wish to make submissions in relation to costs.



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John Stewart



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Mark Johnson



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Joan Cruse