

LEGAL PROFESSION BOARD OF TASMANIA

No. 42 / 2016

COMPLAINANT

Complainant

-AND-

A PRACTITIONER

Legal Practitioner

DECISION AND REASONS FOR DECISION

Decision

The complaint is dismissed pursuant to s.433 (1) of the *Legal Profession Act 2007*.

Background

1. The Complainant separated from his ex-wife, on 5 September 2011. There is a long history of dispute between the Complainant and his ex-wife relating to the finalisation of family law matters including a property settlement and parenting orders. In 2011 the Complainant filed an application in Launceston in the Federal Magistrates Court of Australia.
2. At all times during the proceedings, which are yet to be finalised, the Practitioner represented the Complainant's ex-wife.
3. In or around April 2013, the Complainant commenced a relationship with another person, Ms B, who was known to the Practitioner. Shortly after the relationship commenced, Ms B sent the Practitioner a Facebook message seeking private advice about the Complainant. The Practitioner replied on 8 April 2013 via a private message on Facebook.
4. The Complainant obtained access to that Facebook message.
5. The Complainant's relationship with Ms B broke down several months later. The Complainant commenced proceedings in the Magistrates Court for recovery of personal effects, which he alleged had not been returned to him. The Practitioner acted on behalf of Ms B. Since then protracted proceedings on this matter have continued in the Magistrates Court.

The Complaint:

6. On 12 July 2016 a complaint was made against the Practitioner.
7. The complaint alleges the Practitioner:
 1. breached his duty of confidentiality by advising Ms B details about the Complainant's ongoing matter with his ex-wife, when acting for his ex-wife in proceedings involving the Complainant;
 2. made inappropriate comments about the Complainant's character on a public site, Facebook, which could be seen to adversely affect the character of the Complainant and his case; and
 3. failed to act in a professional manner by using delaying tactics to render the Complainant financially disabled in pursuing proceedings for access to his child and property settlement.
8. The Complainant seeks to have the Practitioner disciplined, receive an apology, resolve his dispute about fees and receive financial compensation.

The Practitioner's Submissions:

9. The Practitioner's submissions seek a summary dismissal of the complaint on the basis that it is "*full of fantasy, gossip, hearsay, half-truths and complete untruths*".
10. The Practitioner's submissions in summary are:
 - The Practitioner has never acted for the Complainant and acts for the Complainant's former partner who has made no complaint.
 - There is current litigation on foot between his client and the Complainant and the matter is listed for in the Federal Circuit Court.

The breach of confidentiality

- The Practitioner denies disclosing or divulging confidential information regarding any family law matters between the Complainant and his ex-wife.
- The Practitioner states that he had virtually no contact with the Complainant's friend during her relationship with the Complainant and only acted for her when her relationship with the Complainant had ended. It is the Practitioner's position that he does not have any conflict of interest in accepting those instructions while acting for the Complainant's former partner.

Inappropriate comments

- The Facebook message was a private message which reflected the Practitioner's personal views.

Delaying tactics

- This allegation was also refuted by the Practitioner on the basis that he had no duty or obligation to the Complainant, but he did as an Officer of the Court. It is his position he has not acted inappropriately and that had he done so a Judge of the Federal Circuit Court could sanction him.

Consideration of the Complaint:

11. Having reviewed all the submissions of the parties, the Board has considered each particular of the Complaint, and provides the following reasons for making its decision:

Allegation 1 –

The Practitioner breached his duty of confidentiality by advising the Complainant's friend details about the Complainant's ongoing matter with his ex-wife when he was acting for his ex-wife in proceedings involving the Complainant.

12. There is no evidence contained within the complaint, or the response to the Practitioner's submissions by the Complainant, or otherwise, which indicates that details of a confidential nature about the dispute with his ex-wife were disclosed to the Complainant's friend.
13. Accordingly, there is no evidence of misconduct available to the Board sufficient to substantiate an unsatisfactory professional conduct finding.
14. The Board therefore finds that this allegation is lacking in substance.

Allegation 2 –

The Practitioner made inappropriate comments about the Complainant's character on a public site, Facebook, which could be seen to adversely affect the character of the Complainant and his case.

15. It is noted that the post was made in April 2013, which is more than three years before the complaint was received. Accordingly, pursuant to s 428 (2) of the *Legal Profession Act 2007* (the Act), this aspect of the complaint cannot be dealt with (other than to dismiss it) unless the criteria at s 428 (2) (a) and (b) are met. The Board is required to consider if it is just and fair to deal with the complaint having regard to the delay and reasons for the delay in making the complaint, and that the behaviour alleged is capable of constituting professional misconduct, and that it is in the public interest to deal with the complaint.
16. The Practitioner admits making the comments detailed in the complaint. However, he maintains that the comments were made privately, notwithstanding they were made on Facebook. While it may be unwise to rely on "private" Facebook posts remaining confidential, viewing a printout of the comments provided by the Complainant supports the fact that the comments were made in a private post, and that assertion has not been denied by the Complainant.
17. The actions of the Practitioner in making the communication, while showing a lack of respect, could not be categorised as a substantial or consistent failure of competence and diligence. There is nothing to indicate the comments were intended to be other than private, and in a personal context. They could not therefore amount to unsatisfactory professional conduct. Nor could they amount to the more serious category of professional misconduct.

18. There is in the above circumstances no apparent public interest in dealing with the complaint. Further, there has been no information provided which would justify the delay in making this part of the complaint.
19. The Board therefore does not make a decision pursuant to s 428 (2) of the Act; as a result the Board cannot deal with this part of the complaint, other than by dismissing it.

Allegation 3 –

The Practitioner failed to act in a professional manner by using delaying tactics to render the Complainant financially disabled in pursuing proceedings for access to his child and property settlement.

20. The delaying tactics alleged by the Complainant are that the Practitioner:
 - provided affidavit material within short time frames before Court proceedings, which did not comply with Court time frames for lodgement;
 - failed to complete share transfer forms within 14 days (allegations against his ex-wife and the Practitioner) contrary to a Court Order;
 - failed to complete bank account transfer forms within 14 days (allegations against his ex-wife and the Practitioner) contrary to a Court Order;
 - the Practitioner (and his ex-wife) held up settlement of a property which was meant to be completed within 28 days but which took 65 days;
 - the Practitioner was chastised by the Judge on 26 August 2013 “for supplying a late, sloppy and unprofessional document” in the form of the affidavit;
 - the Complainant was left to organise property valuations for three properties despite a letter from the Practitioner stating he would organise the valuations; and
 - prior to April 2013, while the Complainant was represented, as many as five letters needed to be written to the Practitioner requesting the same information, all of which were ignored.
21. The Practitioner has defended his actions, notes that the Complainant was at all times represented by his own lawyer, and asserts that he has not done anything inappropriate in relation to his duty or obligation to both the Court and his client.
22. While the Complainant has provided no evidence of the above allegations to show the Practitioner deliberately caused unnecessary delays, it is noted that most of the allegations are in relation to court orders which would bind the ex-wife rather than the Practitioner. Further there is no indication that the failure to meet the court timetable was a failure on the part of the Practitioner, rather his ex-wife.
23. Even had the Practitioner been a contributing cause, in the instances alleged by the Complainant, being in the conduct of active court proceedings, the appropriate remedy for the conduct complained of would be sanction by the Court, including costs orders against the offending party. The Court would normally if necessary regulate Practitioner and parties’ conduct by the imposition of appropriate court

directed timetables. The Complainant has provided anecdotal evidence that this occurred on at least one instance with respect to the Practitioner.

24. To the extent that the allegation of using delaying tactics is wider than the specific examples alleged, Family Law Rules 1.07 and 1.08 are directed to parties and practitioners to ensure that disputes are resolved as quickly and cheaply as possible. It is notable that a failure to comply with the Rules can be taken into account by the court in the consideration of any costs orders.
25. The Courts, in their decisions and orders, are perfectly placed to manage undue delaying tactics of either party. The Courts could have, but did not, make appropriate directions or sanction the Practitioner for his behaviour. Accordingly, the Board finds that the Practitioner's conduct in this respect could not reasonably amount to a conduct allegation.

Conclusion

26. The Board is required to determine whether the Practitioner has breached the professional standards required of an Australian Legal Practitioner. The Board requires clear and cogent evidence in order to find the Practitioner has breached those standards.
27. In this case, the Board is satisfied that allegations 1 and 3 are lacking in substance and are therefore dismissed pursuant s433 (1) (a) of the Act.
28. Allegation 2, absent a determination pursuant to s428 (2) of the Act, is not one which the Board has power to deal with; no determination has been made, and allegation 2 is therefore dismissed pursuant to 433 (1) (e) of the Act.

Decision dated the 23rd day of November 2016.

Legal Profession Board of Tasmania

Per: 

Chairperson

Please note that within 21 days after the date of this determination the complainant or the legal practitioner, the subject of the complaint may apply to the Disciplinary Tribunal or Supreme Court to have this matter heard by the Disciplinary Tribunal or Supreme Court and may make an application to the Disciplinary Tribunal or Supreme Court to stay the determination pending the finalisation of such an application.

Please be aware that an application made to either the Disciplinary Tribunal or Supreme Court may, in the event that application is unsuccessful, result in a costs order against you. Accordingly, it is recommended that independent legal advice is sought prior to making such an application.

Any application to the Disciplinary Tribunal must be in accordance with the form prescribed under the Legal Profession (Disciplinary Tribunal) Rules 2010 (see <http://www.lpbt.com.au/policy-and-guidelines/>).

The contact details of the relevant bodies are as follows:

Disciplinary Tribunal Secretary Mrs Maria Dwyer, Ogilvie Jennings: 6272 6860

Supreme Court, General Enquiries: 1300 664 608