

## Solicitors behaving badly – private disputes, professional consequences

- *A solicitor must... not... invoke the coercive powers of a court...principally in order to harass or embarrass...[or] to gain some collateral advantage...out of court.*<sup>1</sup>
- *A solicitor must not...In the course of practice or otherwise...bring the profession into disrepute.*<sup>2</sup>
- *A solicitor must not...take steps towards the publication of any material...which may prejudice...the administration of justice.*<sup>3</sup>

How we conduct ourselves during private disputes can have professional consequences, a recent hard lesson for New Zealand solicitor Jeanne Denham.

Ms Denham was found to have engaged in professional misconduct (the more serious of disciplinary findings) for running a public vilification campaign against her former husband.<sup>4</sup> The tribunal found that she had used allegations of domestic violence in a media campaign targeting him and the school at which he was the principal to pressure him into a favourable property settlement.

At strategic points in the investigation concerning her allegations against him and subsequent proceedings, material was sent to a widely read political blogger who used it to publish highly critical items about her husband and the school. This was part of a considered strategy designed by a media consultant. When police declined to prosecute, Ms Denham brought a private prosecution. Repeated blog posts (and later newspaper articles) were run criticising the school and the principal, even going so far as publishing the contact details of the members of the school's governing body so that they could be pressured directly.

The decision to bring the private prosecution backfired, the court finding that:

“...I am satisfied beyond any doubt that this private prosecution has been brought for an ulterior motive by the complainant, that is, primarily to destroy his career and reputation... to obtain an advantage in pressing the relationship property claim. On that basis alone the charges should be dismissed.”

Costs of \$146,000 were awarded against her. A disciplinary prosecution was brought on the basis that she had abused the DV complaint processes to pursue a collateral purpose. The applicable NZ rule requires that legal processes be used only for “proper purposes” and prohibits causing “unnecessary embarrassment” to any person. Analogous rules apply in Queensland.

Ms Denham claimed that her motivation was to protect others in violent relationships and to ensure that she was fairly treated in any media coverage of the dispute. An analysis of the communication with her media advisor, measuring the impact of each leak and arranging timing that would defeat non-publication orders weighed heavily against her contention.

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<sup>1</sup> *Australian Solicitors Conduct Rules 2012* ('ASCR'), rules 21.1.3 & 21.1.4.

<sup>2</sup> *Ibid*, rules 5.1 & 5.1.2.

<sup>3</sup> *Ibid*, rule 28.

<sup>4</sup> *National Standards Committee v Jeanne Denham* [2017] NZLCDT 10.

## When does conduct outside the practice of law become a matter for professional discipline?

Whilst disreputable or dishonest conduct in the course of professional practice is the primary focus of legal regulators, whether a person is a fit and proper person to practise law is also informed by private conduct. Sexual misconduct,<sup>5</sup> tax evasion<sup>6</sup> and fraud<sup>7</sup> have all led – unsurprisingly – to solicitors being removed from the roll. “Private” behaviour does not have to amount to criminality before fitness to practise comes into question. Our personal conduct as a litigant is especially relevant to our professional fitness to practise due to the close nexus with the justice system. Dishonest or misleading statements,<sup>8</sup> misleadingly selective material<sup>9</sup> and reading stolen documents<sup>10</sup> place practising certificates at risk.

### Examples

Recently, a practitioner was struck off<sup>11</sup> for threatening defamation proceedings against an opposing party without adequate foundation in law, and further threatening disciplinary proceedings against that party’s solicitor for “republication” (when the allegedly defamatory material was sent on to the practitioner himself.) The tribunal considered that the conduct was sufficiently egregious and protracted that it indicated unfitness to further engage in legal practice.

Family law matters are an especially fertile opportunity for poor judgment to stack professional difficulties on top of marital woes.<sup>12</sup> The most striking case in this area is *Bain & Bain (Deceased)*<sup>13</sup> in which a self-represented solicitor gave an undertaking to the court to hold sale proceeds of marital assets on trust but failed to do so. The judge at first instance sentenced him to six months in prison (finding & penalty set aside on appeal).<sup>14</sup> Whether the undertaking was sufficiently brought to his attention was later the subject of the successful appeal.<sup>15</sup>

Assisting clients to disseminate scandalous material or bringing a claim for a collateral purpose is also risky. *Legal Services Commissioner v Orchard*<sup>16</sup> is a good example of a solicitor who, although not the source of unnecessarily scandalous material, did not adequately reflect upon the nature and relevance of material in submissions that his client had prepared. The client was a teacher accused of impropriety with his de facto’s daughter. In deregistration proceedings the client prepared lengthy submissions in which he attacked his former partner, revealed intimate (and irrelevant) details about their relationship and threatened further disclosure if the complaint proceeded.

The mere appearance of using our professional standing to bully or harass a member of the public may lead to profound reputational damage well before a regulator takes an interest. In 2014, a Harvard Law professor (Ben Edelman) was widely mocked after he threatened litigation for being overcharged \$4 for his Chinese takeaway. It did not matter that he was in fact over charged, or that the restaurant was cavalier when he raised it - he looked like a bully and did irreparable harm to his image. Years later, this is still the most prominent feature of a Google search of his name, rather than his considerable academic achievements.

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<sup>5</sup> *The Law Society of South Australia v Rodda* [2002] SASC 274 (indecent assault, underage complainant); *Barristers’ Board v Pratt* [2002] QCA 532 (indecent assault against a minor).

<sup>6</sup> *New South Wales Bar Association v Cummins* [2001] NSWCA 284; *NSW Bar Association v Hamman* [1993] NSWCA 404; *The Law Society of South Australia v Liddy* [2003] SASC 379.

<sup>7</sup> *Prothonotary of the Supreme Court of NSW v Carr* [2004] NSWCA 2; *Re a Practitioner* (1997) 95 A CrimR 467 (FC (SCWA)).

<sup>8</sup> *Barristers’ Board v Young* [2001] QCA 556; *New South Wales Bar Association v Cummins* [2001] NSWCA 284, 45.

<sup>9</sup> *Legal Services Commissioner v Hackett* [2006] LPT 015; *In re Thom*; *Ex parte The Prothonotary* (1964) 80 WN (NSW) 968 (denial of adultery in divorce proceedings).

<sup>10</sup> *Legal Services Commissioner v Harb* [2017] NSWCATOD 9,

<sup>11</sup> Appeal pending; see *Legal Services Commissioner v CGSL Jensen* [2017] QCAT 148.

<sup>12</sup> *Coe v New South Wales Bar Association* [2000] NSWCA 13.

<sup>13</sup> *Bain (Deceased) & Bain (No 3)* [2016] FamCA 662 (9 August 2016); *Bain and Bain* [2017] FamCAFC 80.

<sup>14</sup> *Bain and Bain* [2017] FamCAFC 80.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Legal Services Commissioner v Orchard* [2012] QCAT 583.

### **What is the take away message?**

- We are perfectly entitled to assert and prosecute our private rights, but must do so very carefully.
- We are no better at staying detached when involved in our own disputes than anyone else. Conduct which might be excused as overzealous representation when acting for a client will be treated much more harshly if acting for yourself or an associate.
- Talk to someone you trust, make it clear you genuinely want their opinion then listen.
- Ensure any allegation you make is well founded legally, relevant to the dispute, supported by evidence and disseminated no further than is strictly necessary.
- Avoid publicising the real or perceived misconduct of the opposing parties in an effort to raise the temperature around them.
- Seek guidance from the [QLS Ethics Centre](#) if you become concerned about your client's efforts to publicise a dispute.

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