

LEGAL PROFESSION BOARD OF TASMANIA

No. 35/2017

COMPLAINANT

Complainant

-AND-

A PRACTITIONER

Practitioner

DETERMINATION AND REASONS FOR DETERMINATION

Catchwords

Professions and Trades- Lawyers- Complaints and Discipline- Professional misconduct and unsatisfactory professional conduct- Solicitor – allegations of frivolous applications to court causing other party to incur wasted legal fees – communication with court and other party

Legal Profession Act 2007 – s 433(1)(a)

Determination

The complaint is dismissed pursuant to section 433(1)(a) of the *Legal Profession Act 2007* ('the Act') as the Board is satisfied that the complaint is vexatious, misconceived, frivolous and lacking in substance.

Reasons for Determination

1. This matter comes to the Board by way of a complaint made on 24 May 2017.
2. The Practitioner acts on behalf of the Complainant's ex-wife who had made application to the Magistrates Court for a Family Violence Order ('FVO'). The Complainant is the Respondent to that application.
3. The initial application for the FVO did not succeed and a further application was made. At that application the Magistrate ordered it be listed for a defended hearing a few months later and gave leave to seek to restore on short notice.
4. The Practitioner wrote to the Associate to the Magistrate applying for an ex-parte order in terms of the original application, which letter set out support for the application. The letter was sent to the Court via email and was marked as being copied by email to the Complainant's then legal representative.

5. The Associate responded to the Practitioner that the Magistrate was not prepared to deal with the matter ex-parte and that service on the Complainant would be required.
6. Having not heard from the Complainant's solicitor, the Practitioner emailed the letter and associated correspondence with the Associate to the Complainant direct the next day.
7. In summary the Complainant has alleged the Practitioner:
 - Inappropriately wrote to the Associate without sending a courtesy copy in a timely manner to his lawyer;
 - Inappropriately sought an ex-parte interim FVO knowing that the same application had been refused on at least two occasions previously;
 - Has failed to file and serve any sworn affidavit material in support of the multiple failed applications;
 - By his actions has deliberately caused the Complainant to incur significant legal costs including defending the 'frivolous' application for an FVO;
 - As a consequence has engaged in and perpetrated the system's abuse upon the Complainant; and
 - That the conduct is in connection with the practice of the law and has fallen 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.
8. While the Board was seeking additional information from the Complainant the Practitioner was served with an affidavit by the Complainant which annexed the Complainant's letter of complaint. In response to that affidavit the Practitioner wrote to the Board seeking that the complaint be dismissed.
9. Consequently the Practitioner was formally notified of the complaint by the Board and advised that his letter to the Board seeking to have the complaint dismissed would be treated as his response to the complaint.
10. The Complainant has been provided with an opportunity to provide further information in support of his allegations and has not done so.
11. The Complainant did take issue with the Practitioner's correspondence to the Board on the grounds that the Practitioner was attempting to unduly influence the assessment and outcome of the complaint. Having regard to the legislative framework which governs the process for dealing with complaints, that contention is without merit.
12. The Board has considered the documents available to it. It notes that the original letter from the Practitioner to the Associate to the Magistrate clearly identified the email as being copied to the Complainant's practitioner.
13. It is not considered a conduct issue for the legal practitioner to assist their client with their instructions to make an application to the Court. Parties to proceedings are entitled to file ex-parte applications with the Court having regard to the

circumstances of a particular matter. Doing so is not considered a denial of procedural fairness or natural justice as the overall interests of justice may require a Court to act without proper notice to the other party.

14. In this matter and irrespective of previous applications for an interim FVO there is no evidence that the letter to the Court from the Practitioner was an attempt to 'trick' the Court. Any issues arising from the application are more appropriately dealt with by the Court including the filing of affidavit material in support of the application and any issues in relation to legal costs.
15. In the opinion of the Board none of the matters of complaint raise any conduct issues that can be established against the Practitioner.
16. In those circumstances the appropriate course is to dismiss the entirety of the complaint as vexatious, misconceived, frivolous and lacking in substance.

Determination dated the 4th day of August, 2017.

Legal Profession Board of Tasmania

Per:



Board Member

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