

LEGAL PRACTICE COMMITTEE OF QUEENSLAND

OFFICE: Brisbane
NUMBER: 1/2020

Applicant: LEGAL SERVICES COMMISSIONER

AND

Respondent: WARREN LANCE ROSEN

ORDER

Before: P Schmidt (Chair)
B Houlihan (Solicitor Member)
L Lynch (Lay Member)

Date: 14 October 2020

Initiating Document: Discipline Application filed on 9 July 2020

THE ORDER, FINDINGS AND REASONS OF THE LEGAL PRACTICE COMMITTEE:

The Respondent was born on 1 February 1947 and is currently aged seventy-three years. He is an Australian legal practitioner within the meaning of section 6 (1) the Legal Profession Act 2007, having been admitted to practice on 27 April, 1987.

The charge against the Respondent is that on 13 November 2019, the Respondent communicated in an opponent's absence, and without their consent, with the Court concerning a matter of substance in connection with current proceedings, in contravention of rule 22.5 of the Australian Solicitors Conduct Rules.

Rule 22.5 of the Australian Solicitors Conduct Rules ('ASCR') states:

A solicitor must not, outside an ex parte application for rehearing of which an opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:

22.5.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or

22.5.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.

ORDER
Filed on behalf of the Applicant
Form 59
Uniform Civil Procedure Rules 1999
Rule 661

Legal Practice Committee
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Brisbane Qld 4000
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The particulars of the charge are detailed in paragraphs B.1 to 1.10 of the Discipline Application.

Throughout 2019, the Respondent acted for a client in family law proceedings in the Federal Circuit Court. On 12 November 2019, a final hearing in the proceedings took place before His Honour Judge Jarrett. His Honour reserved his decision at the conclusion of the hearing.

On 13 November 2019, the Respondent sent an email to Judge Jarrett's Associate, alleging that his opponent had failed to disclose a bank account in the proceedings. Further, the Respondent advised of his intention to reopen the proceedings as a result. The effect of the email was to potentially reflect negatively on the opponent's credit in the proceedings as it suggested that the opponent had purposely withheld existence of the bank account during the disclosure process, in circumstances where the opponent's credit was in issue in the proceedings.

The Respondent sent the email without giving forewarning to the opponent or seeking the opponent's consent. The opponent's solicitor was copied into the email. The opponent's solicitor promptly advised the Respondent by return email that the assertion regarding the bank account was incorrect. The opponent's solicitor noted that the Respondent's email raised a matter that could easily have been resolved by communication between the solicitors and expressed the view that the communication with the court was "inappropriate, and incorrect" and reflected negatively on the opponent as a witness of credit. The opponent's solicitor attached a draft letter which he insisted the Respondent send to rectify the issue as a matter of urgency.

The following day, 14 November 2019, the Respondent replied to the opponent's solicitor advising him that he had taken further instructions and was of the view that no proper grounds existed for an application to reopen the proceedings. The Respondent did not take any steps to advise Judge Jarrett's Associate that the assertion regarding the bank account was in error, thus necessitating the opponent's solicitor to do so.

The parties have filed an Agreed Statement of Facts. There is agreement that the email which is the basis for the charge was sent in breach of ASCR 22.1 because:

- a. it was sent in the opponent solicitor's absence; and
- b. it concerned a matter of substance in the proceeding; and
- c. at no time had the court communicated with the Respondent in such a way as to require the Respondent to respond to the court; and
- d. the opponent's solicitor had not consented to the Respondent sending it to the court.

There is also agreement by the parties that by sending the email to Judge Jarrett's Associate and subsequently failing to rectify the incorrect information contained in the email, the Respondent engaged in conduct which fell 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.

The Respondent raised in oral submissions that it is common practice for practitioners to communicate with the Associates of the Judges of the Federal Circuit by copying in the opposing practitioner/party without having sought the consent of that party prior to the communication being sent. The Committee does not accept the validity of that submission as an explanation for non-compliance with Rule 22.5 ASCR.

The Respondent also raised in oral submissions that the conduct of the opposing spouse had influenced his decision not to rectify the breach. The Committee does not accept that any conduct on the part of an opposing party lessens the ethical obligations of a practitioner.

The Committee finds that Respondent's conduct was in breach of rule 22.5 of the ASCR. The email communication contained information which was incorrect and potentially damaging about the opponent in circumstances where it had the potential to impact on the Judge's assessment of the opponent's credit. The Respondent made no attempt to obtain the consent of the opponent before the communication was sent. The Respondent failed to retract the incorrect information with the court despite the insistence of the opponent's solicitor in circumstances where he could easily have done so. The Respondent has not apologised to the court, the opponent or the opponent's solicitor.

The Committee finds the conduct complained of amounts to unsatisfactory professional conduct and finds the Respondent guilty of unsatisfactory professional conduct.

In considering penalty, the Committee is mindful of the objective of protection of the public and the maintenance of proper professional standards and the need to deter the practitioner and also other practitioners from engaging in like conduct.

The Respondent has had two other disciplinary proceedings brought against him prior to the conduct which is the subject of the charge, one in 2015 resulting in a finding of unsatisfactory professional conduct and a further decision in 2016 resulting in a finding of professional misconduct.

There is clearly a significant need for personal deterrence given the Respondent's tendency to disregard his ethical obligations as a solicitor.

The Committee has considered the following factors:

1. The Respondent has cooperated with the Legal Services Commission in its investigation and pursuit of the matter.
2. The Respondent's disciplinary history;
3. The Respondent's unwillingness to rectify the breach by correcting the record upon request, which is reflective of a lack of remorse;
4. The Respondent has breached his ethical obligations notwithstanding undertaking the Queensland Law Society Legal Ethics course which he states he completed in late 2018/early 2019.

IT IS THE DECISION OF THE COMMITTEE THAT:

1. The Respondent be publicly reprimanded.
2. The Respondent is ordered to pay a fine of \$3,500 payable within 3 months of today's date.
3. The Respondent is ordered to undertake the Queensland Law Society Legal Ethics Course at his own cost, to be completed no later than 30 June 2021.
4. A copy of this Order is to be forwarded to the Principal Ethics and Practice Counsel of the Queensland Law Society within 21 days of today's date and a report is to be

delivered by the Course Coordinator to the Secretariat within one month of the Respondent completing the course.

5. The Respondent is ordered to pay the Applicant's costs, if agreed between the parties within 30 days of agreement, or failing agreement, to be assessed by reference to the Supreme Court Scale of Costs and payable within 30 days of the date of Assessor's Certificate.
6. This Decision is to be published on the Disciplinary Register of the Legal Services Commission website.



Chairperson

15 October 2020