DECISION

Case number: OCR144-14
Applicant: Legal Services Commissioner
Respondent: Warren Lance Rosen

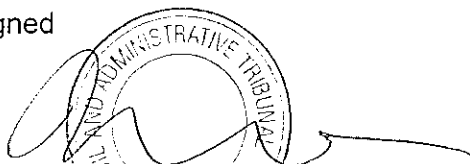
Before: Justice Thomas, President
Assisted by:
Ms Megan Mahon, Legal panel member
Ms Julie Cork, Lay panel member

Date: 5 February 2016
Proceeding Type: On the papers

IT IS THE DECISION OF THE TRIBUNAL THAT:

1. The respondent be publicly reprimanded.
2. There be a pecuniary penalty in the sum of $5,500.00.
3. The respondent is to undertake the "Queensland Law Society Remedial Ethics Course" or such other equivalent course to be approved by the Queensland Law Society.
4. The respondent is pay the costs of the applicant assessed and calculated by reference to the Supreme Court Scale of Costs.

Signed



Justice Thomas, President
Queensland Civil and Administrative Tribunal

QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Legal Services Commissioner v Rosen* [2016] QCAT
PARTIES:	Legal Services Commissioner (Applicant/Appellant) v Warren Lance Rosen (Respondent)
APPLICATION NUMBER:	OCR144-14
MATTER TYPE:	Occupational Regulation matters
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	**Justice DG Thomas, President** Assisted by: **Ms Megan Mahon, Legal panel member** **Ms Julie Cork, Lay panel member**
DELIVERED ON:	5 February 2016
DELIVERED AT:	Brisbane
ORDERS MADE:	1. **The respondent be publicly reprimanded.** 2. **There be a pecuniary penalty in the sum of $5,500.00.** 3. **The respondent is to undertake the "Queensland Law Society Remedial Ethics Course" or such other equivalent course to be approved by the Queensland Law Society.** 4. **The respondent is pay the costs of the applicant assessed and calculated by reference to the Supreme Court Scale of Costs.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY PROCEEDINGS – PROFESSIONAL MISCONDUCT – where the respondent failed to disclose factual matters that were within his knowledge at the hearing of

an ex-parte application in the Magistrates Court – where full disclosure required under rule 19.4 of *the Australian Solicitors Conduct Rules* 2012 – where statement of agreed facts filed – where respondent disputes breach of rule 19.4 – whether respondent's conduct constituted professional misconduct or unsatisfactory professional conduct

Australian Solicitors Conduct Rules 2012 r 19.4
Legal Profession Act 2007 (Qld) ss 418, 419 420(a), 456
Queensland Civil and Administrative Tribunal Act 2009 (Qld) ss 32, 462(5)

Adamson v Queensland Law Society Incorporated (1990) 1 Qd R 498
Debera Anne Ebbett SCT/76
Elfic Ltd & Ors v Macks & Ors [2001] QCA 219
Legal Services Commissioner v Madden (no 2) [2008] QCA 301.
Re Cooke (1889) 5 TLR 407
Thomas A Edison Limited v Bullock [1912] 15 CLR 679

APPEARANCES and REPRESENTATION (if any):

This matter was heard and determined on the papers pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) ('QCAT Act').

REASONS FOR DECISION

Charge

[1] The application or referral for disciplinary proceedings filed by the Legal Services Commissioner asserts that on 25 October 2013 Mr Rosen, in the course of seeking interlocutory relief in an ex parte application in the Wynnum Magistrates Court, failed to disclose to the Court all factual or legal matters in accordance with Rule 19.4 of the *Australian Solicitors Conduct Rules* 2012 ('The Rules').

Background

[2] The parties have filed an agreed statement of facts in these proceedings.

[3] Mr Rosen acted on behalf of an applicant mother in the proceedings at the Magistrates Court.

[4] After taking instructions, by email dated 18 October 2013 at 3:50pm to the respondent father, Mr Rosen advised as follows:

a) He acted for the applicant mother who alleged that the father had engaged in sexually inappropriate behaviour.

b) The matter had been reported to the Queensland Police Service and the Department of Child Safety for further investigation.

c) He had advised his client not to permit further face to face contact pending the completion of investigations by the two authorities.

d) The father's telephone time with the child could continue provided he did not discuss the allegation with the child in Wynnum Magistrates Court.

[5] On 22 October 2013 Mr Rosen filed an ex parte application and an affidavit in support, on behalf of the applicant mother.

[6] On 23 October 2013 the father's solicitors, Michael Lynch Family Lawyers, sent a letter dated 22 October 2013 to Mr Rosen which indicated as follows:

a) Michael Lynch Family Lawyers acted on behalf of the respondent father.

b) They had to hand, a copy of the correspondence dated 18 October.

c) The father strongly denied the allegation made by the applicant mother.

d) The father had not been contacted by the Queensland Police Service or the Department of Child Safety.

e) The law firm held instructions from the father to commence an application in the federal circuit Court to reinstate his time with the child and inquired whether Mr Rosen's office held instructions to accept service.

f) On or without prejudice basis so the father could continue to spend time with the child pending the application being listed and that he would consent to his time with the child being supervised by an independent third party.

g) The father's telephone time with the child would continue on the basis that he would not discuss the allegation with the child as proposed in the respondent's correspondence of 18 October 2013.

[7] By email dated 24 October 2013 to Michael Lynch Family Lawyers, Mr Rosen confirmed receipt of the letter dated 22 October 2013 and advised that the letter had been forwarded to his client for instructions.

[8] On 25 October 2013, Mr Rosen appeared before his Honour Magistrate Sarra at the hearing of the ex parte application.

[9] At the commencement of the hearing the following exchange occurred between Magistrate Sarra and the respondent:

> *Bench: Alright, is the father aware of this application?*
>
> *Mr Rosen: No, he's not your Honour.*
>
> *Bench: Why is that?*
>
> *Mr Rosen: Because it was brought on ex parte and I have only just got the documents back today in any event.*
>
> *Bench: And because what, sorry?*
>
> *Mr Rosen: I only received the sealed copy of the documents back this morning, your Honour.*

[10] During the hearing on 25 October 2013 Mr Rosen did not disclose the following factual matters to the Court which were within his knowledge.

a) His email dated 18 October 2013 to the respondent father;

b) That the respondent father was legally represented by Ms Honan of Michael Lynch Family Lawyers as of 22 October 2013;

c) That the father denied the allegations made by the applicant mother;

d) That an investigation had been conducted by the relevant authorities in relation to the applicant mother's prior allegations that the respondent father had engaged in sexually inappropriate behaviour whilst their child was in his care in April or May 2013 and that no adverse findings were made against the respondent father;

e) That the father had not been informed of the particulars of the April or May 2013 allegations as he had not been served with the ex-parte application or the applicant mother's affidavit filed in the court;

f) That the applicant mother continued to allow the father to care for their child three nights a fortnight after the alleged April or May 2013 incident until 14 October 2013;

g) That in his email of 18 October 2013 the respondent had advised the father that his telephone time with the child could continue provided that he did not discuss the allegation with the child;

h) Ms Honan's letter dated 22 October 2013;

i) That the father had proposed a suitable, appropriate safe means of contact with the child in the letter dated 22 October 2013 from Ms Honan which was that the father have independently supervised

contact with the child and that he continue to have access to telephone time with the child on the basis that he would not discuss the allegation with the child; and

j) That he was unaware of the status of the Police and Department of Child Safety investigations in relation to the alleged 14 October 2013 incident and had taken no steps to ascertain same prior to the hearing.

[11] On 25 October 2013, Magistrate Sarra ordered that the child live with the applicant mother and that all time between the father and the child be suspended.

[12] On 8 November 2013, Magistrate Sarra set aside the order of 25 October, making a costs order against Mr Rosen and reserved his decision as to whether it would be on a party and party basis or an indemnity basis.

The position of each of the parties

[13] The Legal Services Commissioner notes that Mr Rosen admits the facts alleged in the discipline application and that the parties rely upon the statement of agreed facts filed on 13 February 2015.

[14] The Commissioner submits that the respondent's conduct contravened Rule 19.4 and so is capable of constituting professional misconduct pursuant to s 420(a) of the *Legal Profession Act* 2007 (Qld) ('The Act'). The Legal Services Commissioner refers to comments made by Magistrate Sarra when setting aside the order made on 25 October 2013 when his Honour stated:

> "... the expectation is that where a person is bringing the application is aware of circumstances, background to a particular matter they are in a higher duty to inform the Court and to properly inform the Court in arriving at a just decision."[1]
>
> "The issue doesn't relate to the correspondence, Mr Rosen, it relates to any facts or circumstances which would support your application. Now when you look at the Rule it says that, and I referred to it earlier "a solicitor has reasonable grounds to believe would support an argument against granting the relief, or limiting the terms adverse to the client". So effectively, you go beyond the advocating on behalf of your client, you take on a different role when you are facilitating a role where you will give the Court the best opportunity to weigh up issues in a one-sided argument."[2]

[15] The Commissioner asserts that failing to disclose to the Court in the ex-parte application the factual matters outlined in paragraph [10] above, contravened Rule 19.4 of the Rules and constitutes professional misconduct.[3]

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1 Statement of agreed facts filed 13 February 2015, annexure 5, lines 10-20.
2 Statement of agreed facts filed 13 February 2015, annexure 5, lines 25-35.
3 Submissions on behalf of the applicant filed 19 March 2015, paragraph 29.

[16] The Commissioner refers to the case of *Re Cooke*[4] when it was observed that "it was the duty of professional men, whether solicitors or counsel, in making an ex-parte application to show the utmost fairness and good faith, and to see that all relevant matters, whether for or against the application, were brought to the attention of the Court."

[17] The Commissioner also refers to the matter of *Debera Anne Ebbett*[5] where the practitioner's conduct was found to amount to professional misconduct. In that case, the litigant was the practitioner's own company and it was found that the practitioner deliberately kept from the Court material facts that she had a duty as a solicitor to make known to the Court.

[18] The Commissioner notes that in response to a question from his Honour as to why the matter had not been served, the respondent did not answer fulsomely but simply said "because it was brought on ex-parte and I have only just got the documents back today in any event".[6] The Commissioner submits that the conduct falls within the more serious category of "professional misconduct" given that Mr Rosen ignored his duty to the Court as a solicitor to make full and frank disclosure to the Court of all factual matters within his knowledge, and chose not to disclose any of these factual matters even when asked by Magistrate Sarra if the father was aware of the application.[7]

[19] The Commissioner concludes that the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.[8]

[20] Mr Rosen does not dispute any of the asserted facts but does not agree that the conduct was in breach of Rule 19.4 of the Rules.

[21] As to the exchange with Magistrate Sarra Mr Rosen says that he took the question to mean – "had I served the father with the application, and if not, why not."[9] Mr Rosen says that "Magistrate Sarra who obviously has control of the proceedings did not pursue the question any further".[10]

[22] Mr Rosen says he was aware of the rule in relation to ex-parte hearings. However having regard to the extremely short period of time in which the exchange with Magistrate Sarra had occurred, and the fact that the issue had not been pursued further by Magistrate Sarra, and having regard to the very limited nature of the order being sought, that is for an adjournment to allow the documents to be served as well as what the

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4 (1889) 5 TLR 407 at 409.
5 SCT/76.
6 Statement of agreed facts filed 13 February 2015, annexure 4, lines 25-40.
7 Submissions on behalf of the applicant filed 19 March 2015, paragraph 40.
8 Ibid.
9 Submissions on behalf of the respondent filed 3 June 2015, paragraph 30
10 Ibid, paragraph 30.

decision should be in those circumstances (allegations of child abuse), Mr Rosen did not consider the rule had any further application.[11]

[23] Mr Rosen also asserts that the conversations and/or correspondence with the solicitors for the father were irrelevant as to the decision to be made by the Court.[12] He says this because in his view, in family law, a court when faced by allegations in relation to child sexual abuse invariably order that future time spent by the other parent is to be supervised pending the Court appointing an independent children's lawyer and preparing a family report in order that there be independent evidence.[13]

[24] On that basis Mr Rosen asserts that the conversations and correspondence were irrelevant as to the decision which would be made by the Court.

[25] Mr Rosen asserts that it is a matter for the Court as to how an application is heard. Magistrate Sarra had taken control of the process and it was not (and never) the right of any lawyer to assert the power of the court to control its own process.[14] He did not actively mislead the Court,[15] he was amenable to the manner in which Magistrate Sarra dealt with the process on 25 October, 2013[16] and it was not his right to interrupt Magistrate Sarra in the manner in which the application was dealt with.[17]

[26] He asserts that with knowledge of an understanding of his obligations under Rule 19.4, he clearly discharged his obligations under that Rule[18] and, in the passion of the moment discharged his obligations to the Court.[19]

[27] Mr Rosen submits that if Magistrate Sarra had chosen to ask him whether the father was aware of the allegations as made by the mother then he would have answered that inquiry fully. However, the Magistrate's Court at Wynnum is a busy Court and under control of its presiding Magistrate therefore, it was Magistrate Sarra who chose to truncate the hearing process to suit himself.[20]

[28] On that basis, Mr Rosen believes that he fully explained his conduct on the day without reservation,[21] and has not breached Rule 19.4 of the Rules.

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11 Ibid.
12 Ibid, paragraph 33.
13 Ibid.
14 Ibid, paragraph 34.
15 Ibid, paragraph 35.
16 Ibid, paragraph 36.
17 Ibid, paragraph 37.
18 Ibid, paragraph 38.
19 Ibid, paragraph 39.
20 Submissions on behalf of the respondent filed 3 June 2015, paragraph 43.
21 Ibid, paragraph 44.

Disposition of the matter

[29] Section 418 of the Act provides that "unsatisfactory professional conduct" includes conduct which 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.

[30] Section 419 of the Act provides that "professional misconduct" includes unsatisfactory professional conduct which involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.

[31] In the case of *Adamson v Queensland Law Society Incorporated*[22] Thomas J formulated the test for professional misconduct as:

> "The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency."

[32] That is an appropriate test to adopt when considering whether conduct amounts to professional misconduct.

[33] Section 420 of the Act provides that conduct consisting of a contravention of a relevant law is conduct which is capable of constituting unsatisfactory professional conduct or professional misconduct.

[34] Mr Rosen's conduct was capable of constituting unsatisfactory professional conduct or professional misconduct.

[35] Rule 19.4 of the Rules require that a solicitor seeking interlocutory relief in an ex-parte application must disclose to the Court all factual or legal matters which:

- Are within the solicitors knowledge;
- Are not protected by legal professional privilege; and
- The solicitor has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.

[36] These Rules reflect the very serious obligations which are owed to the Court by solicitors and barristers who appear in ex-parte matters. Those serious obligations have been described as requiring practitioners to show the utmost fairness and good faith, and to see that all relevant matters, whether for or against the application, are brought to the attention of the Court.[23]

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22 (1990) 1 Qd R 498 at 507.

23 *Re Cooke* (1889) 5 TLR 207 at 409.

[37] This duty has been described in many decisions. In *Thomas A Edison Limited v Bullock* it was said at [682]:

> "Uberrima fides is required, and the party inducing the Court to act in the absence of the other party, fails in its obligation unless he supplies the place of the absent party to the extent of bringing forward all the material facts which that party would presumably have brought forward in his defence to that application."[24]

[38] In *Elfic Ltd & Ors v Macks & Ors* it was said at [162]:

> "A party seeking ex-parte relief must make disclosure to the Court of all matters within his knowledge... there is substantial authority for the proposition that Courts require a high degree of candour and responsibility of those who seek ex-parte orders and it has sometimes been said that the utmost good faith is required."[25]

[39] It is fundamental to the administration of justice that, particularly in the context of ex-parte applications, Courts are able to be confident in relying upon practitioners to show utmost fairness and good faith in the way in which these matters are conducted and presented. This arises because in such matters, the applicant is seeking relief in the absence of the other party and so it is essential that all material be put before the Courts by those who are seeking such relief.

[40] Mr Rosen's submissions demonstrate that he appears to have no comprehension of the very onerous duty which he owes to the Court and which is reflected in Rule 19.4.

[41] The questions asked by Magistrate Sarra at the commencement of the hearing on 25 October were asked against the background of Magistrate Sarra's knowledge of the effect of the obligations of parties appearing in ex-parte matters.

[42] He made this obvious in his comments to Mr Rosen on 8 November when he referred to the obligation as being "a higher duty to inform the Court and to properly inform the Court in arriving at a just decision".[26] Magistrate Sarra went on, "so effectively you go beyond the advocating on behalf of your client, you take on a different role where you are facilitating a role where you will give the Court the best opportunity to weigh up the issues in a one-sided argument".[27]

[43] Mr Rosen's submission that the approach he took in answering the questions on 25 October arose because Magistrate Sarra "chose to truncate the hearing process to suit himself"[28] has no merit and demonstrates a lack of comprehension of the duties owed by a legal practitioner in relation to ex-parte applications.

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24 [1912] 15 CLR 679.
25 [2001] QCA 219.
26 Page 16, lines 10-20 of annexure 5 of statement of agreed facts.
27 Statement of agreed facts filed 13 February 2015, annexure 5, lines 30-35.
28 Submissions on behalf of the respondent filed 3 June 2015, paragraph 43.

[44] Mr Rosen submissions that the conversations and all correspondence he had with the solicitor for the father were irrelevant seem at odds with his submissions (in the same part of his submissions) that the likely approach of the Court would be that, pending further order, future time spent by the other parent "is supervised pending the Court appointing an independent children's lawyer". The submission is so clearly incorrect in view of the fact that the offer made by the lawyers for the father included a proposal for "a suitable appropriate and safe means of contact with the child which was that the father have independently supervised contact with the child and that he continue to have access to telephone time with the child on the basis that he would not discuss the allegation with the child".[29]

[45] As to the telephone contact, the offer made was in accordance with the requirement demanded by Mr Rosen. As to the physical contact with the child, the offer catered for the approach which Mr Rosen asserts would have been taken by a Court.

[46] As to those issues, the correspondence was clearly relevant. The correspondence was also clearly relevant in that it contained a strong denial of the allegation made against the father and also an indication that the father would be commencing an application in the Federal Circuit Court to reinstate his time with the child (and sought instructions as to whether Mr Rosen had instructions to accept service).

[47] The duty of a legal practitioner when appearing in ex-parte matters extends to revealing any matters which may be relevant. The duty is to "err on the safe side" disclosing more than less. It is not a question of carefully analysing questions asked by a Judge and then answering the questions strictly so as to limit the flow of information. The argument outlined in paragraph 42 of Mr Rosen's submissions[30] suggesting he would have provided more information had Judge Sarra framed his question in a different way, does no credit to Mr Rosen.

[48] While it is not necessary for the disposition of the charge relating to Rule 19.4 of the Rules, the Tribunal observes that Mr Rosen's conduct verged upon misleading the Court, rather than failing to provide full and frank disclosure.

[49] Because of the fundamental nature of the obligation of legal practitioners when appearing in ex-parte matters, a breach of the obligation and consequently a breach of Rule 19.4 violates and falls short of, to a very substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.

[50] The conduct should therefore be categorised as professional misconduct.

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29 Ibid, paragraph 11(h)(i).

30 Submissions on behalf of the respondent filed 3 June 2015.

Penalty

[51] Upon a finding of professional misconduct the Tribunal may make any order it thinks fit including one or more of the orders outlined in s 456 of the Act.

[52] Disciplinary penalties are not imposed as punishment but rather in the interests of the protection of the community from unsuitable practitioners.[31] In this context, the Tribunal should have regard to principles of personal and general deterrence.

[53] The disciplinary regime seeks to maintain proper standards in the profession to define conduct which is unacceptable. In the context of this disciplinary application the profession must be aware of the paramount duty to the Court which requires utmost fairness and good faith in disclosing to the Court in ex-parte applications all material factual matters which are within their knowledge.

[54] The orders listed in s 456 of the Act include removing the name of the legal practitioner from the local roll, suspending or cancelling a practising certificate, imposing conditions on the Practising Certificate, a public or private reprimand and a fine.

[55] In the matter of *Ebbett*[32] referred to earlier, the Commissioner has pointed out that while the Tribunal ordered that the practitioner's name be struck from the roll of solicitors the conduct of Ms Ebbett was much more serious.

[56] The Commissioner submits that the orders which are appropriate are that there be a public reprimand and a fine of between $3,000.00 and $5,000.00.

[57] Mr Rosen submits that the discipline application should be dismissed.

[58] In the current circumstances, the Tribunal is not of the opinion that the conduct demonstrates that Mr Rosen is not a fit person to be a legal practitioner.

[59] However, Mr Rosen's actions, and his submissions, demonstrate that he has a lack of comprehension about his duties in this area, despite being an Accredited Family Law Specialist and holding himself out as such.

[60] In determining the penalty, the Tribunal has had regard to these matters and also the need to deter other practitioners from indulging in conduct similar to that of Mr Rosen.

[61] The Tribunal orders that:

a) The practitioner be publicly reprimanded.

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31 *Legal Services Commissioner v Madden (no 2)* [2008] QCA 301.

32 *In the matter of Debera Anne Ebbett* SCT/76.

b) ~~There be a fine in the sum of $5,500.00.~~

c) The practitioner is to undertake the "Queensland Law Society Remedial Ethics Course" or such other equivalent course to be approved by the Queensland Law Society.

Costs

[62] The applicant seeks an order for costs.

[63] Having found that the practitioner engaged in conduct which was categorised as professional misconduct, the Tribunal must make an order requiring the practitioner to pay costs including the costs of the Commissioner, unless the Tribunal is satisfied that exceptional circumstances exist.[33]

[64] No exceptional circumstances exist in this case.

[65] The parties have provided no detail concerning the appropriate quantum of costs and so it is not possible to make an order by reference to a stated amount as is contemplated by s 462(5) of the QCAT Act.

[66] In those circumstances, the Tribunal orders that the practitioner pay the costs of the applicant assessed and calculated by reference to the Supreme Court Scale of Costs.

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[33] S 462(1) *Legal Profession Act* 2007.