LEGAL PRACTICE COMMITTEE OF QUEENSLAND

OFFICE: Brisbane
NUMBER: 2/2020

Applicant: **LEGAL SERVICES COMMISSIONER**

AND

Respondent: **MICHAEL ANTHONY CORBIN**

ORDER

Before: P.M.Schmidt, (Chair)
M Conroy (Solicitor Member)
K Corbiere (Lay Member)

Date: 1 December 2020

Initiating Document: Discipline Application filed on 7 September 2020

Proceeding Type: Discipline Hearing [on the papers]

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

The Respondent is an Australian legal practitioner within the meaning of section 6 (1) of the *Legal Profession Act 2007* ('the Act') and has, at all material times, held a Queensland restricted practising certificate. The Respondent is 55 years of age and was admitted to practice as a solicitor of the Supreme Court of New South Wales on 15 December 2000.

The Respondent has no disciplinary history in any Queensland disciplinary body. On 16 February 2012, the New South Wales Legal Services Commissioner determined that there was a reasonable likelihood of a finding that the Respondent had engaged in unsatisfactory professional conduct given a failure to fulfil his obligation to have trust account records externally examined, as a result of which the Respondent was reprimanded.

The charge against the Respondent which is before the Committee is that he 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 particulars of the charge are detailed in paragraphs 1.1 to 1.18 of the Discipline Application.

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In his capacity as duty lawyer at a regional Magistrates Court, the Respondent took instructions from a defendant client in a criminal matter. He was instructed by the client to plead guilty on his behalf and to represent him at the sentencing hearing. The Respondent accepted the client's instructions, entering a plea of guilty to a stalking charge and two minor (summary) drug offences, resulting in the client being sentenced to probation for two years and a restraining order of five years duration, with no conviction recorded.

The parties have filed an Agreed Statement of Facts.

There is agreement that the Respondent had, prior to Court commencing on the day in question, participated in a text exchange with a co-worker which made him aware that the client was subject to an intensive treatment order (ITO) and that a mental health report was outstanding. The Respondent did not advise the client that the outstanding mental health assessment might provide him with a potential mental health defence to the stalking charge, instead accepting and acting upon the client's instructions to plead guilty. The report, subsequently received, indicated that the client was not of sound mind when he committed the stalking offence but was of sound mind at the time he provided instructions.

It is agreed between the parties that, due to an administrative oversight by the Respondent's employer, the client's file had only been provided to the Respondent on the morning that the matter was before the Court, resulting in the Respondent only having a short amount of time to review the material and take instructions.

The Respondent agrees that by failing to advise the client about a potential mental health defence and the desirability of an adjournment to obtain the final mental health assessment, the Respondent engaged in conduct which fell substantially short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.

The Respondent was aware that the client was subject to an ITO. Given the client's vulnerability and the desirability to have the mental health report prior to a plea being entered, the Committee finds that the Respondent was not acting in the best interests of his client and was thereby in breach of rule 4.1.1 of the Australian Solicitors Conduct Rules ('ASCR').

The failure to advise his client that the mental health report may provide a potential defence to the stalking charge, and the failure to advise his client of the desirability of requesting an adjournment to await the mental health report, deprived the client of the ability to make informed choices about action to be taken during the course of the matter, amounting to conduct by the Respondent in breach of rule 7.1 of the ASCR.

Accordingly, 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 Applicant submits that the Respondent should be publicly reprimanded pursuant to section 458(2)(a) of the Act, that there are not special circumstances to justify a private reprimand, and that a private reprimand would not adequately achieve the

desirable deterrent outcome and protective purpose that attends disciplinary proceedings generally.

In *Legal Services Commissioner v Trost* (No 3) [2020] QCAT 86, Daubney J observed at [18]-[20]:

> [18] In this disciplinary jurisdiction, orders are shaped in the interests of the protection of the community from unsuitable practitioners, and in determining what orders should be made 'regard should primarily be had to the protection of the public under the maintenance of proper professional standards'[1].
>
> [19] In the circumstances of the present case, the following observations by Thomas J in *LSC v Bentley*[2] are apposite:
>
>> [48] Another aspect of protection of the public is the maintenance of standards within the legal profession. If conduct is identified as being unsatisfactory professional conduct or professional misconduct, one of the aims of any sanction is to dissuade other practitioners from such conduct - essentially to warn practitioners that such conduct is not acceptable.
>>
>> [49] That aim is best achieved by a public reprimand.
>
> [20] In *NSW Bar Association v Sahade (No 3)*[3], the New South Wales Tribunal addressed the use of public and private reprimands:
>
>> [128] A difference between a 'public reprimand' and a 'private reprimand' is that the former, being published, can act as a warning to others not to offend in a similar way. A reprimand that remains private can really act only as a personal deterrent. Therefore, in the case of a legal practitioner who himself requires no deterrence, one factor that might determine whether a reprimand should be public would be whether there is any reasonable possibility that one or more other legal practitioners might act in the same way as the legal practitioner under consideration. If there is no such likelihood, one reason for imposing a public reprimand would be absent.

The Respondent's submissions refer *to Legal Services Commissioner v Cooper* [2011] QCAT 2009, where the practitioner used impertinent language in correspondence, as analogous to the current case, submitting that there is no need for general deterrence.

The conduct complained of is described in the Respondent's submissions as a failure to advise a client of a possible defence.

The Committee considers the conduct complained of is more accurately described as a failure to exercise appropriate legal reasoning in a limited timeframe, a not irregular occurrence in the course of ordinary legal practice. The Committee holds the view that it is paramount that practitioners are mindful of their obligation to always exercise appropriate legal reasoning when advising their client or, alternatively, to seek the indulgence of the Court or the opposing party to afford them adequate time to properly consider the matter. The Committee considers these are fitting circumstances for a general deterrence.

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[1] *Legal Services Commissioner v Madden* (No. 2) [2009] 1 Qd R 149, [122]; see also *Legal Services Commissioner v Meehan* [2019] QCAT 17, [31], cited in *Legal Services Commissioner v Trost* (No 3) [2020] QCAT 86 [18] (Daubney J).

[2] *LSC v Bentley* [2016] QCAT 185, cited in *Legal Services Commissioner v Trost* (No 3) [2020] QCAT 86 [19] (Daubney J).

[3] *NSW Bar Association v Sahade (No 3)* [2016] NSWADT 39, cited in *Legal Services Commissioner v Trost* (No 3) [2020] QCAT 86 [20] (Daubney J).

Submissions received on behalf of the Respondent raise the following as demonstration of special circumstances justifying a private reprimand: -

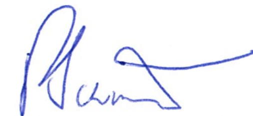
1. The Respondent has cooperated with the Commission in its investigation and pursuit of the matter;
2. The Respondent was representing a client in hurried circumstances, with limited time to prepare, through no fault of his own;
3. The Respondent's conduct was not deliberate;
4. The Respondent deeply regrets his failing, which he has found particularly troubling;
5. There are no permanent consequences for the client as a result of the Respondent's failing, given that the client successfully applied to have the plea of guilty vacated and the stalking charge was ultimately dismissed, with the restraining order remaining in place.

Whilst mindful of the mitigating factors raised by the Respondent, the Committee considers like factors are frequently raised by way of mitigation in the defence of any discipline application, such that they do not amount to special circumstances warranting a private, as opposed to a public, reprimand.

IT IS THE DECISION OF THE COMMITTEE THAT:

1. The Respondent be publicly reprimanded.
2. The Respondent is ordered to pay the Applicant's costs as agreed between the parties in the amount of $2,000 within 30 days of the date of this Order.
3. This Decision is to be published on the Disciplinary Register of the Legal Services Commission website and the Legal Practice Committee website.

A party dissatisfied with a final decision of the Committee may apply to the Queensland Civil and Administrative Tribunal for a review of the decision.



Chairperson
1 December 2020