

Legitimate advocacy

by Stafford Shepherd



Rule 34.1.3 of the *Australian Solicitors Conduct Rules 2012* ('ASCR')

provides that a solicitor must not, in any communication associated with representing a client, use tactics that go beyond legitimate advocacy which are designed to embarrass or frustrate another person.

One of the fundamental duties of a solicitor is to act in the best interests of a client in any matter in which we represent the client.¹ The responsibility we owe towards our client does not mean that we should ignore or disregard the rights of third parties. Such third-party rights may include: restrictions on methods of obtaining evidence from third parties, and interfering with the solicitor-client relationship of other practitioners.

This rule can be said to temper overzealousness in representing a client. Although we should act with robustness and dedication to our client's interests, we are bound by our duty to the administration of justice, and as officers of the court, not to engage in conduct that goes beyond legitimate advocacy and which is primarily designed to embarrass or frustrate another person.² Evidence gathering may fall within the ambit of rule 34.1.3 ASCR. In dealing with an opponent³ in relation to a case, we must not knowingly make a false statement.⁴ If we do, then we are required to take all the necessary steps to correct any false statement made by us to an opponent as soon as possible after we become aware that the statement was false.⁵

We must not engage in conduct which is likely to be to a material degree prejudicial to, or diminish the public confidence in the administration of justice.⁶

In *In re Comfort*⁷ a lawyer wrote and then published an accusatory letter to another

lawyer. The disseminating of the letter was seen by the court as designed to embarrass the lawyer for no legitimate reason. The decision of *Legal Services Commissioner v Orchard*⁸ is also illustrative of the rule's application. The judicial member described the material as a "scandalous document" which went "beyond the limits of a proper defence", containing descriptions which attempted to embarrass.⁹

Stafford Shepherd is director of QLS Ethics Centre.

Notes

¹ *Australian Solicitors Conduct Rules 2012* ('ASCR'), rule 4.1.1.

² ASCR, rule 34.1.3.

³ 'opponent' is defined in the glossary to the ASCR

⁴ ASCR, rule 22.1.

⁵ ASCR, rule 22.2.

⁶ ASCR, rule 5.1.

⁷ 59 P.3d 1011 (Kan. 2007).

⁸ [2012] QCAT 583 ('Orchard').

⁹ *Ibid*, [8].

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