

NOTICE OF DETERMINATION

A notice made under s318 of the *Legal Profession Uniform Law (Victoria)*.

Complainant: [REDACTED]
Respondent Lawyer: [REDACTED] of [REDACTED]
Ref: [REDACTED]

ORDERS

Pursuant to section 299(1) of the *Legal Profession Uniform Law (Victoria)* ("the Uniform Law"), I have decided that [REDACTED] has engaged in unsatisfactory professional conduct and I make the following order –

1. The respondent lawyer be cautioned pursuant to section 299 (1)(a) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. On 4 April 2016 my office received a complaint ("the complaint") from [REDACTED] ("the complainant") about [REDACTED] ("the lawyer").
2. The complaint concerned conduct of the lawyer during a family law property dispute. The complainant, who was the applicant in the proceedings, was represented by [REDACTED] of [REDACTED] and the respondent, [REDACTED] ("the respondent") was represented by the lawyer.
3. The complainant states in his complaint that during the course of the dispute, the lawyer and the respondent took steps to have the complainant terminate the retainer of [REDACTED] without his knowledge or consent.
4. The complaint specifies that on or around 4 January 2016 the lawyer received instructions from the respondent that she had communicated with the complainant and they had both agreed to release \$100,000 from the lawyer's controlled money account to be disbursed to the respondent and the complainant equally. Following receipt of those instructions, the lawyer drafted two letters on behalf of the complainant, for him to sign. The first letter was addressed to [REDACTED] at [REDACTED] and purported to be sent from the complainant. The letter informed [REDACTED] that the complainant wished to terminate his retainer and wished to represent himself. The second letter was addressed to the lawyer herself and was purportedly sent from the complainant. The letter informed the lawyer that he was no longer represented by [REDACTED] and invited the lawyer to communicate with him directly.
5. The lawyer sent a copy of the letters to the respondent via email on 4 January 2016.
6. The respondent forwarded a copy of the letters to the complainant but he did not sign them and continued to engage [REDACTED] to act on his behalf.

7. [REDACTED] continued to act and the family law property application has since settled by consent orders on the basis of a 50/50 split of the assets and liabilities between the complainant and respondent.

INVESTIGATION

1. On 6 April 2016 the complainant provided further evidence in relation to his complaint. He provided an email dated 4 January 2016 from the lawyer to the respondent attaching a number of documents, including the draft letters referred to in the complaint. Also attached to the email were:
 - a. Two blank authorities, one in the name of the complainant which authorised the release of \$100,000 from a controlled money account (\$50,000 of which was to be paid to the respondent); and
 - b. A Notice of Address for Service completed on behalf of the complainant but prepared by [REDACTED] as the lawyer for the person filing the notice.
2. This office contacted the complainant on 8 April 2016 and requested that he provide further evidence in relation to the lawyer having knowledge of his mental health issues when she drafted the letters. As the complainant was unable to provide the documents, he requested that this office contact [REDACTED] to obtain this information.
3. The complaint was published to the lawyer by letter dated 23 May 2016. The lawyer provided a detailed response by way of letter to this office dated 4 June 2016.
4. On 26 July 2016 this office contacted [REDACTED] to request information in relation to the issue of the complainant's mental health.
5. On 28 July 2016 [REDACTED] provided this office with two affidavits that were filed in the family law matter. The first affidavit was that of the complainant and dated 10 May 2015, and contained statements in relation to his mental health issues on a number of occasions. The second affidavit was the affidavit of the respondent which was witnessed by the lawyer on 30 May 2015, which responds to the complainant's affidavit and appears to concede that the complainant does have mental health issues.
6. This office wrote to the lawyer on 26 July 2016 requesting further information to which the lawyer responded in a letter dated 4 August 2016.
7. Following our request for information on 26 July 2016, this office received an email from the respondent on 8 August 2016 outlining her version of events regarding the instructions she had given the lawyer and the advice she had received.
8. The lawyer and the client's evidence were consistent with each other. The evidence was that:
 - a. the respondent telephoned the lawyer informing her that she wished for \$100,000 to be transferred from the controlled monies account and distributed equally between the parties.
 - b. the respondent informed the lawyer that the complainant had agreed to the transfer and he had informed her that he no longer had [REDACTED] acting as his legal representatives.

- c. the respondent instructed the lawyer that the release of the monies was urgent and that she did not wish to incur further legal fees and as such directed the lawyer not to contact [REDACTED] to confirm that the husband agreed to the release of the funds and that they no longer held instructions to act on his behalf.
 - d. the authorities and letters were drafted and provided to the respondent as 'samples' of what the lawyer required prior to her being able to speak directly to the complainant and/or releasing the funds held in the lawyers controlled monies account.
9. Further, the lawyer provided file notes that appear to corroborate her and the respondent's evidence; in that the lawyer explained to the respondent that she was not permitted to speak directly to the complainant in circumstances where he was represented by a solicitor. The file note also indicated that the respondent had instructed the lawyer not to contact the complainant's solicitor to confirm if they were still acting as she did not wish to incur further fees in relation to the communications. The file notes and the respondent's email to this office dated 8 August 2016 confirm that the respondent instructed the lawyer to provide her with 'samples' of the type of documents the lawyer required prior to communicating directly with the complainant.
10. On 6 September 2016 a further letter was sent to the lawyer outlining concerns regarding her conduct.
11. The Lawyer provided a response to the letter dated 6 September 2016 on 21 September 2016. The letter provided little insight from the lawyer in relation to her conduct.
12. Following the receipt of the letter [REDACTED] of this office telephoned the lawyer to discuss her response and more particularly the lack of insight into her conduct. [REDACTED] explained to the lawyer that drafting the 'sample' letters in the detail and manner the lawyer had done was very problematic and that this office was concerned that the lawyer was unable to understand why this was so.
13. On 27 September 2016, following the telephone conversation with [REDACTED], the lawyer provided a further response to the letter dated 6 September 2016. In her response the lawyer outlined that she was embarrassed and sorry for her conduct and she understood that drafting the letters was 'unwise'. The lawyer confirmed that if she was presented with the same situation in the future she would act differently and would seek the assistance of the LIV Ethics advice line.
14. On 12 October 2016 a letter was sent to the lawyer pursuant to section 299(2) of the Uniform Law outlining that this office was likely to order that she be cautioned for her conduct. The complainant was also sent a letter outlining the proposed penalty.
15. On 18 October 2016 the lawyer responded and reiterated that she was embarrassed and sorry for her conduct and confirmed that if presented with the same situation in the future she would act differently. The lawyer sought that no penalty be ordered, however agreed to a caution if the Commissioner determined that it was necessary.
16. The complainant did not respond to our letter dated 12 October 2016.

OUTCOME

17. On the basis of the evidence outlined above the lawyer has breached Rules 3.1 and 4.1.4 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* and therefore the solicitors conduct amounts to unsatisfactory professional conduct.
18. The lawyer has admitted to drafting and providing the letters to the respondent.
19. The lawyer has agreed that drafting a letter in the name of the complainant with the detail that she did (including his name, his lawyer's name and address, reasons for wishing to terminate the retainer and the matter reference number used by [REDACTED]), compromised her integrity and professional independence. The lawyer understands that this conduct is undesirable and has confirmed that if presented with the situation again she would act differently.
20. The lawyer agrees that she should not have drafted "sample" letters in the name of the complainant, seeking to terminate his retainer with his current lawyers. The lawyer agreed that instead she could have provided her client with a summary of what she required from the complainant prior to speaking to him or alternatively offered to make a free-of-charge phone call to [REDACTED] to confirm they had ceased to act on behalf of the complainant.
21. The lawyer has said that in the future, if any of her clients insist on her drafting such letters she would inform them that she could not and if the client continued to insist she do so then she would cease to act.

DETERMINATION

8. Having considered all of the evidence and relevant law, and having made the above findings on the issues under investigation, I determine that it is fair and reasonable in all the circumstances to make the order detailed above.

APPEAL

9. Pursuant to section 314 of the Uniform Law, a respondent lawyer or a legal practitioner associate of a respondent law practice may, in accordance with the applicable legislation appeal to the Victorian Civil and Administrative Tribunal, or seek a review by the VCAT, of this determination made under section 299 of the Uniform Law.

[REDACTED]

Michael McGarvie, Board CEO and Commissioner

Date: 5 April 2017