

NOTICE OF DETERMINATION

A notice made under section 318 of the *Legal Profession Uniform Law* (Victoria) (“Uniform Law”).

Complainant: [REDACTED]
Respondent Lawyer / Law Practice: [REDACTED] / [REDACTED]
Ref: [REDACTED]

ORDERS

Pursuant to section 299(1) of the Uniform Law, I have decided that the Respondent Lawyer, as a legal practitioner associate of the Law Practice, has engaged in unsatisfactory professional conduct. I make the following orders –

- a. A caution pursuant to section 299(1)(a) of the Uniform Law, for the conduct in failing to communicate advice concerning the potential conflict of interest to the Complainant in a clear and timely manner, in breach of Rule 7.1 of the *Legal Profession Uniform Law Australian Solicitors’ Conduct Rules* 2015 (“Conduct Rules”).
- b. A caution pursuant to section 299(1)(a) of the Uniform Law, for the conduct in failing to comply with the obligation to provide the complainant with updated written disclosure as soon as practicable after becoming aware of a substantial change to a disclosure already made, in breach of section 3.4.16 of the *Legal Profession Act* 2004 (“LPA”).

STATEMENT OF REASONS

BACKGROUND

1. On 8 July 2013, the Law Practice was first instructed to act for the Complainant in relation to a domestic building dispute concerning extensive defects to renovations to her home in a regional Victorian town.
2. On 9 April 2014, after initial investigations and informal negotiations with the legal representatives of the registered Builder responsible for the renovations, the Complainant gave instructions to the Law Practice to issue proceedings at the Victorian Civil and Administrative Tribunal (“VCAT”) against the builder she claimed was responsible for the extensive defects as Defendant.
3. A number of lawyers at the Law Practice worked on the Complainant’s matter during the course of the retainer.
4. Until 8 September 2015, the Law Practice (with the Respondent Lawyer as supervising partner) continued to act for the Complainant, on which date the Complainant was informed by the Law Practice it could no longer act due to a conflict of interest with another party joined to the proceedings on 26 August 2015.

5. After the retainer ended, the Complainant sought alternate representation and continued with her proceedings in the VCAT.

ISSUES UNDER INVESTIGATION

6. The investigation of the complaint included the following –
 - a. Considering all of the issues of concern raised in the complaint, including a detailed review of all of the materials provided by the Complainant;
 - b. Considering the responses received from the Respondent Lawyer once the alleged conduct had been published to him, including a detailed review of all of the materials provided by the Respondent Lawyer;
 - c. An extensive review of the Law Practice's file in relation to which the alleged conduct related;
 - d. An interview with the Complainant; and
 - e. An interview with the Respondent Lawyer.
7. The Complainant and Law Practice successfully resolved the consumer matter dispute brought before me.
8. The issues that have been investigated as conduct capable of amounting to a disciplinary finding are as follows –
 - a. The Complainant alleged that she was not advised of the risks and issues associated with the joinder of the parties at any time until 8 September 2015, despite knowledge of who the potential defendants may have been soon after receipt of first instructions; and
 - b. The Complainant alleged that at no time subsequent to receiving a Costs Agreement and Disclosure Statement on 26 July 2013 were the estimated costs updated or revised in writing until 14 August 2015, despite significant change to the nature of her claim and the associated costs.

INVESTIGATION

9. On 15 October 2015, my office received the complaint.
10. On 16 November 2015, my office sent a letter to the Respondent Lawyer that gave notice of the complaint, requested a response pursuant to section 371(1) of the Uniform Law and invited him to make any written submissions.
11. On 8 December 2015, my office received a response from the Respondent Lawyer. In the response the Respondent Lawyer stated, amongst other things, that the Law Practice had provided the Complainant with further disclosure upon the issuing of proceedings, then again on 14 August 2015, and during the retainer in relation to disbursements to be incurred. Further, the Law Practice described its conflict checking procedure and how it

was implemented in relation to the Defendant builder. The Law Practice denied a conflict check should have occurred earlier in relation to other parties.

12. Further submissions were received from the Complainant on 3 February and 11 February 2016 and negotiations commenced in relation to the consumer matter aspects of the complaint.
13. A further submission was received from the Law Practice on 19 May 2016 and 29 July 2016 and the file was received and inspected given the differing versions of events. A number of further emails were received from both parties.
14. On 21 September 2016, my office sent a letter to the Respondent Lawyer, which gave notice of the proposed determination and invited written submissions about the proposed order. The issues were discussed with the Complainant over the telephone.
15. On 24 October 2016, the Respondent Lawyer provided a written response to the proposed determination and he and another lawyer of the Law Practice attended at the Commissioner's offices on 26 October 2016 to discuss amongst other things, the proposed determination. The consumer matter aspect was successfully resolved.
16. By email dated 12 January 2017, the Respondent Lawyer advised that he accepted the Commissioner's proposed determination and that he would not make any further submissions. This was communicated to the Complainant.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION & CHARACTERISATION OF THE CONDUCT

Failing to communicate advice concerning the potential conflict of interest in a clear and timely manner

17. The Law Practice ceased to act for the Complainant due to a potential conflict of interest between the interests of the Complainant, a current client, and a former client, an engineering company, responsible for the structural drawings relied upon by the Defendant Builder and who was ultimately joined by the Defendant to the proceedings.
18. The Law Practice's file, as held for the Complainant, evidenced a thorough conflict check had been undertaken in relation to the Builder immediately when instructions were received from the Complainant on 8 July 2013.
19. The Law Practice demonstrated that its standard practice is to attend to conflict checks by way of a software application, as well as sending an email to all employees.
20. No further conflicts checks were made on any other potential party until 20 August 2015.
21. The Law Practice maintained that the conflict of interest did not arise as an issue until the receipt of consultant's report, as commissioned by the Defendant on 4 August 2015. The issue in contention was that this report, for the first time, questioned the integrity of the structural drawings relied on by the Builder in completing the renovations to the Complainant's home.
22. Upon examination of previous reports and material before me, I found that there had been no indication of an issue with the engineering or architectural specifications and a major

- part of the claim concerned the Builder deviating significantly from those specifications of his own volition. The Defendant had not raised the matter previously.
23. I also accept the parties were focused on settling the claim and minimising costs rather than speculating on possible trajectories for the matter.
 24. I found no clear evidence from the file as to the exact point at which the Law Practice received the engineering drawings from the Complainant and were therefore aware of the connection with the authors.
 25. The involvement of the engineering company may have been within the scope of speculation as a possible party to any future proceeding, which would have increased in likelihood as the matter progressed. Although it would have been prudent to undertake the check at an earlier stage, I do not consider it was a requirement until the interests of the engineering company were likely to be effected by the proceedings. Therefore, I do not consider that not attending to the conflict check earlier than the receipt of the consultant's report on 4 August 2015 amounts to a disciplinary breach.
 26. However, the circumstances surrounding the timing and events that occurred after the receipt of the consultant's report amount to a course of conduct, offending Rule 7 of the Conduct Rules. The Law Practice submitted, in its explanation of 8 December 2015, that this was when it first became aware the engineering drawings could be an issue in the proceedings.
 27. A conflict check was not undertaken until 20 August 2015, despite an extensive letter of advice being sent to the Complainant on 14 August 2015 about the potential joinder of several parties including the engineering company.
 28. The conflict check, in my view, should have been done before writing such an extensive letter. Not only does it not accord with the Law Practice's own demonstrated procedure, but the Complainant was not fully informed in that extensive letter of advice of the very real possibility the joinder would mean the Law Practice would be required to cease acting for her.
 29. The Law Practice also arranged by email a conference with Counsel for the Complainant, which took place on 25 August 2015. The email contained advice about the joinder and the reasons for the Conference. In neither of these communications with the Complainant was there mention of the potential conflict, which was discovered by Law Practice five days previously on 20 August 2015.
 30. The engineering company was joined to the proceedings on 26 August 2015. The Law Practice then failed to make any genuine efforts to contact the Complainant to advise her of the conflict. It merely sent a benign email inviting her to contact the Respondent Lawyer. The retainer was then terminated without discussion by letter on 8 September 2015.
 31. I am satisfied this course of conduct amounts to unsatisfactory professional conduct within the meaning of section 296 of the Uniform Law.

Failing to comply with the obligation to provide updated written disclosure as soon as practicable after becoming aware of a substantial change to a disclosure already made

32. The Law Practice provided the Complainant with a Disclosure Statement pursuant to section 3.4.9(1) of the LPA dated 26 July 2013.
33. The Disclosure Statement dated 26 July 2013 was generally compliant with the LPA, and I note as follows –
- The agreement was expressed to be for a litigious matter, being a domestic building dispute;
 - An estimate of \$2,000.00 to \$10,000.00, inclusive of fees and disbursements, was given;
 - Reference was made to the estimate being revised should the scope of the work change;
 - Information was given about meeting the costs of the Defendant, despite the agreement being expressed to be for a non-litigious matter;
 - The standard variables pertaining to what factors may affect the estimate was also given.
34. I detected the following issues with the Disclosure Statement dated 26 July 2013 –
- The scope of the work to be completed is not set out;
 - It does not give any substance to what work the estimate is for;
 - It is generic and not tailored to Complainant's particular needs or legal matter;
 - The possibility of VCAT proceedings was not foreshadowed;
 - The estimate itself was broad and gives no information about stages or timing for the matter.
35. There was an email to the Complainant from the Law Practice dated 30 July 2013 containing quality advice and steps to be taken, but this was not linked to the estimate given.
36. The Complainant was informed by email dated 6 August 2013, that professional costs were already at the bottom range of the estimate in the Disclosure Statement, less than two weeks after the Disclosure Statement was provided.
37. In November 2013, the lawyer with carriage of the Complainant's matter went on extended leave. This lawyer provided a clear and accurate summary for the next lawyer to take over conduct of the Complainant's matter. However, no written updates of estimated legal costs were given and there was no indication as to the following lawyer's hourly rate.
38. By late November 2013, given that the Defendant was also threatening to issue VCAT proceedings, and a building report was received from the Complainant, it ought to have

been apparent to the Law Practice that the extent of the claim was potentially greater than initially believed, there being a large number of defects to the renovations.

39. The Law Practice engaged in lengthy discussions and redrafts of a response to the Defendant, with the Complainant, which was sent on 6 December 2013 –
- The Complainant expressed at this point unhappiness with perceived delay and costs and the change of law practices;
 - A memo to the Respondent Lawyer of 30 January 2014 highlights these issues and discounts on fees were suggested and approved;
 - However, despite this and pending proceedings, there appears to have been no consideration given to reassessing the costs agreement or updating the disclosure statement.
40. A response was received from the Defendant and by mid-March 2014, the clear advice to the Complainant was to issue proceedings in VCAT.
41. A file note of an attendance on the Complainant in March 2014 shows that oral advice about costs of proceeding to VCAT is given at “30-40 K”. This also accords with the Complainant’s recollection.
42. On 9 April 2014, an email trail between the Complainant and Law Practice confirmed instructions to issue proceedings, but still no written advice confirming the potential risks and associated costs were given.
43. At this stage, Counsel was engaged. Counsel provided written costs disclosure to the Law Practice. The Law Practice forwarded this on to the Complainant, and did no more.
44. During the matter, Counsel properly updated his disclosure in writing on a number of further occasions as the proceedings progressed. These are simply forwarded to the Complainant without consideration of the accuracy or currency of the Law Practice’s own disclosure about their current or future professional costs.
45. At the point of issuing the proceedings in October 2014, there was no written advice about professional costs or formal updating of the disclosure. At this point, the Law Practice should have considered provision of a fresh disclosure statement or a carefully written update which included the scope of the work. The maximum amount of the original estimate range of \$10,000 had also been exceeded by this time. This was especially important given the generic nature of the original costs agreement and disclosure statement.
46. In mitigation of the Law Practice’s failure to provide updated disclosure, I am encouraged by the following actions from the Law Practice –
- There was benefit to the Complainant in receiving regular interim bills. She paid the majority of them without raising any issues or seeking estimates for future work.
 - The Complainant was given a brief oral update that appears to be reasonably accurate.

47. Despite what I say above, regular billing does not take away from a Law Practice's obligation to provide written updates of estimates where there is a substantial change to the likely estimated costs.
48. The LPA requires written updates be given in accordance with sections 3.4.9(1)(b)(iii) and 3.4.16.
49. The obvious policy considerations behind the LPA, and now the Uniform Law, are aimed at the protection of consumers, enabling them to make informed choices about the costs they wish to incur and proposed work which they wish to pay for.
50. On 14 August 2015, a full updated Disclosure Statement was provided to the Complainant, when it was apparent further parties should have been joined to the proceedings. This should have been attended to at the time of obtaining initial instructions to issue proceedings in March 2014 or at the latest in October 2014 when proceedings were issued and served.
51. I am satisfied this course of conduct amounts to unsatisfactory professional conduct within the meaning of section 296 of the Uniform Law.¹

RELEVANT LAW

52. The LPA and the Conduct Rules apply to the conduct, the subject of the findings of fact. Specifically –
 - Rule 7.1 of the Conduct Rules; and
 - Section 3.4.16 of the LPA.

DETERMINATION & REASONS

53. 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 orders detailed above.
54. In making my decision, I have taken into account that the Law Practice has –
 - Cooperated with this investigation;
 - No history of previous adverse disciplinary findings in relation to the lawyers involved in the matter; and
 - Made substantial and significant improvements to the way it conducts its practice to ensure clients are made aware of significant changes to their respective legal matters, both in relation to legal costs and substantive issues such that proper and informed instructions are given.

¹ Clause 27 of Schedule 4 of the Uniform Law applies the Uniform Law to investigations of prior conduct, being conduct occurring prior to the commencement of the Uniform Law on 1 July 2015 so long as that conduct was not previously investigated but could have been the subject of a complaint under the LPA. Any disciplinary action taken cannot be more onerous than that which could have been taken under the LPA. The investigation is made by comparison to the applicable provisions of the LPA and associated Rules

APPEAL

55. 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.



Michael McGarvie
Victorian Legal Services Commissioner
Date: 13 February 2017