

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]
Case reference: [REDACTED]

Orders

- 1) Pursuant to section 290(2)(a) of the Uniform Law, I make the following order –
That the Respondent Lawyer be cautioned.
- 2) Pursuant to section 290(2)(d) of the Uniform Law, I make the following order –
That the Respondent Lawyer undertakes a professional development course with focus on practice management: specifically, appropriate billing and compliance with costs disclosure obligations, to be approved by me **within 6 months** of this date.
- 3) Pursuant to section 290(2)(e) of the Uniform Law, I make the following order –
Under section 308(3) of the Uniform Law, the Law Practice must **repay \$3,104.93 to the Complainant within 45 days.**

I have made this order in relation to legal costs charged by the Law Practice to the Complainant regarding the following bill –

- Invoice Number dated 21 August 2015, for an amount of \$10,705.90.

I consider the amount of legal costs that are fair and reasonable in relation to this bill pursuant to section 292 of the Uniform Law, to be **\$7,600.97** (GST inclusive). The Complainant has already paid a sum of **\$10,705.90** to the Law Practice.

Statement of Reasons

Background

1. On or around 3 September 2013, the Respondent Lawyer received instructions from the Complainant in relation to Family Law property settlement/parenting arrangements.
2. On or about 10 January 2014, the Respondent Lawyer states that he provided the Complainant with a Disclosure Statement and Costs Agreement under the *Legal Profession Act 2004* ("LPA"). The Complainant denies ever receiving such a Statement and I note a copy of it did not appear on the Respondent Lawyer's file. The Statement noted that:
 - a. Costs would be charged at the rate of \$300.00 per hour for professional attendances plus the Family Law scale for other work;

- b. Total legal costs were estimated at between \$12,000.00 to \$15,000.00, plus disbursements to trial.
3. The matter proceeded through the Family Court and on 4 August 2015, \$150,445.00 was deposited to the Law Practice's trust account (on behalf of the Complainant) in settlement of the matter.
4. On 4 August 2015, the Complainant was issued with an invoice for \$330.00.
5. On 11 August 2015, the Complainant was issued with an invoice for \$22,144.60, which was later withdrawn.
6. On 18 August 2015, the Complainant was issued with an invoice for \$10,561.30.
7. On 21 August 2015, the Law Practice replaced the invoice dated 18 August 2015 with an itemised "Amended Tax Invoice", in the sum of \$10,705.90. In addition to this sum, further disbursements totaling \$8,995.00 (primarily counsel's fees) were incurred.
8. Total legal costs charged by the Law Practice to the Complainant were \$20,030.90, which were paid in full as a result of a transfer from the Law Practice's trust account to office account. This figure was comprised as follows:
 - \$11,035.90 – the total of the 4 August 2015 and 21 August 2015 invoices; and
 - \$8,995.00 – disbursements, which were not the subject of any invoice.
9. On 29 September 2015, an "Amended Trust Statement" was issued to the Complainant, which indicated *inter alia*, that all outstanding legal costs had been paid from trust and that a balance was due to the Complainant of \$140,534.10.
10. On 3 February 2016, my office received the Complainant's complaint.
11. The Complainant and Respondent Lawyer attempted to resolve the dispute informally. Both made offers to one another. However, these offers did not result in a satisfactory resolution of the matter for each other.

ISSUES IN DISPUTE

The issue that remains in dispute is whether the Law Practice's bill is fair and reasonable.

Complainant's Case

The Complainant raised the following concerns in his complaint –

a. Legal costs

- The Respondent Lawyer verbally quoted him \$10,000.00 - \$12,000.00 (for legal costs and disbursements) "to cover everything" at the beginning of the retained and never provided him with a costs disclosure statement. Because of this, the Respondent Lawyer should be held to his verbal quote.

- Costs have now risen to triple what the Respondent Lawyer originally quoted.
- Many of the items on the itemised bill (dated 21 August 2015) were “made up or exaggerated”.

Respondent Lawyer’s case

The Respondent Lawyer said the following in response to the complaint –

a. Legal costs

- The Law Practice’s costs are fair and reasonable.
- Costs Disclosure was provided early in the retainer. The rate charged (being similar to the Family Law scale) was fair and reasonable.

On 26 August 2016, the Respondent Lawyer offered to repay the Complainant \$5,000.00 to settle the costs dispute in this matter. A Settlement Agreement was drafted, but ultimately the Complainant had some concerns with the wording and did not sign the agreement.

Findings on Issues in Dispute

(a) Fair and reasonable legal costs

A costs review was undertaken of the Respondent Lawyer’s file. It was assessed in accordance with the Family Law scale relevant on 21 August 2015, when the bill was issued. I consider that **\$7,600.97** (including GST) represents the fair and reasonable legal costs for the Law Practice’s bill. This amounts to a reduction of **\$3,104.93** from the Law Practice’s bill.

I have reduced the amount that the Respondent Lawyer is able to charge for the following reasons –

1. Costs Disclosure

The Costs Reviewer was not able to ascertain from the file whether the subject Costs Disclosure was ever provided to the Complainant. I note that a copy of the Costs Disclosure did not appear on the Respondent Lawyer’s file, which was provided to this office under cover of letter dated 22 July 2016. At the request of this Office, under cover of letter dated 23 September 2016 the Respondent Lawyer provided a copy of the Disclosure Statement which the Respondent Lawyer advised had been provided to the Complainant. The document was dated 10 January 2014 but was unsigned.

The Costs Reviewer further noted that:

- Even if disclosure had been provided in January 2014, section 3.4.11 of the LPA was breached as the Disclosure was not made “before, or as soon as practicable after, the law practice is retained in the matter”.

- The meaning of “professional attendances” in the Disclosure Statement was too unclear as to give the Complainant any certainty as to how he was to be charged;
- The Disclosure Statement contained outdated provisions in relation to charging interest under the *Penalty Interest Rates Act* (prohibited since December 2007) and the incorrect statement that the complainant had only 60 days to seek a costs review in the Costs Court.
- The file was in a poor-to-average state. The file notes of conversations and attendances, in particular, were very poor. Times were rarely noted, the handwriting was often illegible, and discussion points/outcomes/legal advices provided were rarely noted. The Costs Court would heavily discount the charges claimed in relation to these kinds of items and, further, would require detailed Affidavit evidence if the claims were to be maintained.
- Disbursements (in particular counsel’s fees) were improperly accounted for. A tax invoice(s) listing disbursements and including a Notice of Withdrawal from Trust is required prior to transferring monies from trust. The provision of a Trust statement or reconciliation showing the distribution of monies in and out, of itself, does not comply with the requirements.
- Were the matter to proceed to a taxation in the Costs Court, the Court would likely void the costs agreement due to doubts as to whether it was provided at all or, if it accepted that it had been provided, on the grounds that that had occurred a number of months after the retainer had commenced. Consequently, the Costs Court would tax the matter on the (GST-inclusive) Family Law scale, which effectively the Respondent Lawyer had charged on in any event, but with the consequential reductions referred to below in relation to the poor to average state of the file.
- No loading is allowable under the Family Law scale and even if it were, the Costs Reviewer would not have allowed one due to the state of the file.

II. File notes lacking sufficient detail to support charges or attendances not supported by any file note

I have *disallowed* or *reduced* the amount that the Law Practice is able to charge for the following attendances, on the basis that the file did not provide sufficient evidence supporting the amount that had been charged:

Attendance date	Description of attendance	Amount charged (incl GST)	Amount allowed (incl GST)
9 January 2014	Confer with you (1/2 hour)	\$112.00	\$0.00
10 January 2014	Confer with you	\$56.00	\$0.00
5 February 2014	Attending conference to instruct on responding material (1 hour)	\$224.00	\$112.00
19 March 2014	Attending you	\$22.50	\$0.00
31 March 2014	Perusing letter from Wife's lawyer	\$27.00	\$0.00
20 April 2014	Perusing letter from Wife's lawyer	\$9.00	\$0.00
30 April 2014	Attendance and preparation for conciliation conference (2 hours)	\$448.00	\$224.00
6 June 2014	Perusing bank statements	\$27.00	\$0.00
25 July 2014	Attending you (1/4 hour)	\$56.00	\$0.00
25 July 2014	Conferring with you on your Affidavits (1.5 hours)	\$336.00	\$168.00
23 June 2015	Attending Auscript by phone	\$23.00	\$0.00
29 July 2015	Attending you by phone	\$23.00	\$0.00
13 August 2015	Photocopying and faxing	\$300.00	\$0.00
TOTAL:		\$1,663.50	\$504.00

III. Attendances being reduced to the Family Law scale

I have *reduced* the amount that the Law Practice is able to charge for the following attendances:

Attendance date	Description of attendance	Amount charged (incl GST)	Amount allowed (incl GST)
23 September 2013	Drawing your statement (6 folios)	\$126.40	\$111.84
12 December 2013	Financial statement	\$95.00	\$43.65
5 March 2014	Attending wife's lawyer by phone	\$22.00	\$12.13
11 April 2014	Perusing 11F Report (7 folios)	\$63.00	\$62.72
2 July 2014	Perusing Family Report (90 folios)	\$810.00	\$806.40
13 August 2014	Drawing and engrossing memo to Counsel	\$76.00	\$65.97
28 August 2014	Drawing and engrossing memo to Counsel	\$25.50	\$21.99

Attendance date	Description of attendance	Amount charged (incl GST)	Amount allowed (incl GST)
3 September 2014	Perusing Counsel's submission	\$117.00	\$116.48
24 March 2015	Perusing your memo (3 folios)	\$45.00	\$30.37
TOTAL:		\$1,379.90	\$1,271.55

IV. *Items not claimable, being claimed at a higher level than fair and reasonable, or a duplicate claim*

I have *reduced* the amount that the Law Practice is able to charge for the following attendances:

Attendance date	Description of attendance	Amount charged (incl GST)	Amount allowed (incl GST)
20 December 2013	Perusing correspondence from wife	\$25.00	\$17.46
6 July 2015	Attending Auscript by phone	\$23.00	\$14.96
TOTAL:		\$48.00	\$32.42

I have *disallowed* the amount that the Law Practice is able to charge for the following attendances:

Attendance date	Description of attendance	Amount charged (incl GST)	Amount allowed (incl GST)
8 November 2013	Letter to wife's lawyer engrossing	\$18.00	\$0.00
6 March 2015	Engrossing same	\$13.00	\$0.00
31 March 2015	Engrossing letter	\$19.00	\$0.00
7 April 2015	Engrossing letter	\$19.00	\$0.00
26 May 2015	Perusing another letter from wife's lawyer [duplication]	\$27.00	\$0.00
1 October 2013 to 13 August 2015	Counter book	\$725.50	\$0.00
TOTAL:		\$821.50	\$0.00

I have reduced or disallowed a total of **\$2,104.93** from the Law Practice's bill.

In relation to determining the question of whether Costs Disclosure was provided to the Complainant by the Respondent Lawyer in January 2014, I had recourse to the following material:

- Discussions with the Complainant and Respondent Lawyer during the informal resolution and investigation stages of the matter;
- The Respondent Lawyer's file;
- Affidavit of the Respondent Lawyer sworn 6 April 2017;
- Affidavit of [REDACTED] employee of the Respondent Lawyer, sworn 6 April 2017;
- Affidavit of the Complainant sworn 13 April 2017;
- Discussion with [REDACTED] dated 7 June 2017.

As a result of consideration of the above material, I am not satisfied that the Respondent Lawyer provided Costs Disclosure to the Complainant in January 2014. As a consequence, I have further reduced by **\$1,000.00** the amount of legal costs chargeable by the Law Practice, making a total reduction of **\$3,104.93** from the invoice dated 21 August 2015.

Determinations & Reasons

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

Further, in making a determination as to costs, I have determined that the amount is fair and reasonable in all the circumstances having regard to section 200 of the Uniform Law, and the following matters. I have also considered the principles in section 172.

Further, I am satisfied that the prerequisites for making a compensation order (pursuant to section 309 of the Uniform Law) have been met.

Non-compliance

Please be aware that a failure to comply with a determination in a consumer matter may amount to conduct capable of constituting unsatisfactory professional conduct or professional misconduct.

[REDACTED]

Michael McGarvie
Victorian Legal Services Commissioner
13 June 2017