

NOTICE OF DETERMINATION

Commissioner
Determination
1 of 15 August 2016

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

Complainant: Victorian Legal Services Commissioner
Respondent Lawyer/Law Practice: Mr Hugh Middleton/Martin Irwin & Richards Lawyers Pty Ltd
Ref: [REDACTED]

ORDERS

Pursuant to section 299(1) of the *Legal Profession Uniform Law* (Victoria) (“the Uniform Law”), I have decided that Mr Hugh Middleton has engaged in unsatisfactory professional conduct and I make the following order–

Mr Middleton is reprimanded pursuant to section 299(1)(b) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. On or about 27 January 2016, the Victorian Legal Services Commissioner (“the Commissioner”) became aware of conduct engaged in by Mr Middleton by way of a letter from [REDACTED], Associate to the Honourable Justice [REDACTED] (“His Honour”) of the Supreme Court.
2. Attached to [REDACTED] letter was a transcript of a directions hearing held on 18 December 2015 in the matter of [REDACTED] (“the proceedings”).
3. Mr Middleton was acting for the plaintiff ([REDACTED]) in the proceedings.
4. The Commissioner decided to treat the matter as a complaint initiated by the Commissioner, pursuant to s 266(2) of the Uniform Law, to avoid any need for the Court to become involved in the investigation as a complainant.

ISSUES UNDER INVESTIGATION

5. The concerns raised by His Honour in the transcript include the following:
 - A failure by Mr Middleton to acknowledge receipt of the Court book sent to him by the other side;
 - A failure by Mr Middleton to communicate with his client and the other side about who he had briefed to appear at the hearing;
 - A failure by Mr Middleton to brief Counsel in time, resulting in his client having to appear at the hearing himself;
 - A lack of responses by Mr Middleton generally to both his client and the other side;
 - A failure by Mr Middleton to facilitate litigation and facilitate dispute resolution;
 - A failure by Mr Middleton to ensure that delays to the litigation were prevented and unnecessary costs were incurred.

INVESTIGATION

6. On 18 March 2016, the Commissioner sent a letter to Mr Middleton that gave notice of the complaint, and that requested a response from him pursuant to section 371(1) of the Uniform Law (and invited any written submissions).
7. Mr Middleton's response was due by 6 April 2016. No response was received by that date.
8. On or about 14 April 2016, the Commissioner sent a follow up letter to Mr Middleton that again requested a response.
9. On or about 20 April 2016, the Commissioner received a response from Mr Middleton. In that response, Mr Middleton explained that:
 - (a) he agreed to act for ██████████ despite practising primarily in criminal law;
 - (b) he would brief barristers who had expertise in this area;
 - (c) he obtained advice that indicated ██████████ prospects of success were not favourable;
 - (d) ██████████ funds for briefing Counsel had been depleted; and
 - (e) it was at this point he should have formally withdrawn from acting for ██████████ and filed the relevant notices.
10. Mr Middleton concluded his response by conceding that he took little or no action on ██████████ file, and that his handling of the matter was not to an acceptable professional standard.
11. On 22 June 2016, the Commissioner sent a letter to Mr Middleton that gave notice of the proposed determination and invited written submissions about the proposed order.
12. On 24 June 2016, the Commissioner received a letter from Mr Middleton. In that letter Mr Middleton confirmed that he agreed to a caution or reprimand as an appropriate outcome, and he advised that he did not have any further material to provide.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

13. On the basis of Mr Middleton's admissions and the evidence before me, I find the following proved:
 - (a) Mr Middleton did not acknowledge receipt of the Court book sent to him by the other side;
 - (b) Mr Middleton failed to communicate with his client and the other side about who he had briefed to appear at the hearing;
 - (c) Mr Middleton failed to brief Counsel in time, resulting in his client having to appear at the hearing himself;
 - (d) Mr Middleton acknowledged a lack of responses generally to both his client and the other side;
 - (e) Mr Middleton failed to facilitate litigation and dispute resolution; and

- (f) Mr Middleton failed to ensure that delays to the litigation were prevented and unnecessary costs were not incurred.

CHARACTERISATION OF THE CONDUCT

14. Rule 4 of the *Legal Profession Uniform Law Solicitors' Conduct Rules 2015* (Vic) ("the Conduct Rules") prescribes that a solicitor:
- 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client.
 - 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible.
 - 4.1.5 comply with these Rules and the law.
15. Rule 13.1 of the Conduct Rules prescribes that a solicitor must terminate a retainer properly.
16. Part 2.3 of the *Civil Procedure Act 2010* (Vic) is also relevant. Specifically:
- Section 20 overarching obligation to co-operate in the conduct of a civil proceeding;
 - Section 22 overarching obligation to use reasonable endeavors to resolve a dispute;
 - Section 25 overarching obligation to minimise delay.
17. Section 298(b) of the Uniform Law prescribes that, without limitation, conduct capable of constituting unsatisfactory professional conduct includes conduct consisting of a contravention of the Conduct Rules.
18. I find that Mr Middleton's conduct has breached rules 4.1.1, 4.1.3, 4.1.5 and 13.1 of the Conduct Rules, as well as sections 20, 22 and 25 in Part 2.3 of the *Civil Procedure Act 2010* (Vic) by reason of the above findings of fact. These breaches constitute unsatisfactory professional conduct pursuant to s 298(b) of the Uniform Law.
19. In making this determination, I have considered analogous decisions of my office and the Victorian Civil and Administrative Tribunal ("VCAT"). Of the decisions considered, conduct involving delay on a lawyer's part and/or failure to communicate with adequate regularity or timeliness and/or failure to respond to a client, either cumulatively or separately, have been characterised as unsatisfactory professional conduct. Similarly, failure to progress a matter has also been characterised as unsatisfactory professional conduct. In my view, there is nothing in this matter to suggest that departure from these authorities is warranted.

OUTCOME

20. Of the decisions I have considered, a range of sanctions have been ordered including a caution, a reprimand, and/or compensation.
21. In light of the above considerations, I find that the most appropriate outcome, with the purpose of improving Mr Middleton's communication and manner of handling similar proceedings, is a reprimand pursuant to s 299(1)(b) of the *Uniform Law*.

22. In making this decision I note that Mr Middleton concedes that he took little or no action on [REDACTED] file, and that his handling of the matter was not to an acceptable professional standard.

DETERMINATION

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

APPEAL

24. 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 VCAT or seek a review by VCAT of this determination.

NON-COMPLIANCE

25. A failure to comply with a determination made under section 299 of the Uniform Law is capable of constituting unsatisfactory professional conduct or professional misconduct pursuant to section 298(h) of the Uniform Law.

[REDACTED]

Michael McGarvie
Victorian Legal Services Commissioner

Date:15/8/2016