

NOTICE OF DETERMINATION

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

Complainant: [REDACTED]
Respondent Lawyer/Law Practice: Mr Visa Nathan/Nathan Dorevitch Lawyers
Ref: COM-2015-1362

ORDERS

Pursuant to s.299(1) of the *Legal Profession Uniform Law (Victoria)* ("the Uniform Law"), I have decided that the Lawyer has engaged in unsatisfactory professional conduct and I make the following orders –

1. The Lawyer is to refund the Complainant the \$500 deposit.
2. The Lawyer shall participate in the following courses as soon as possible:
 - a. Bookkeepers Trust Recording Workshop; and
 - b. Authorisation to Receive Trust Money Course.
3. The Lawyer is reprimanded pursuant to s.299(1)(b) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. On 1 December 2014 the Federal Circuit Court of Australia ("Court") made Orders ("Orders") in accordance with consent orders executed by the Complainant and his wife resolving a property dispute. The Lawyer did not represent the Complainant during these proceedings.
2. On 22 January 2015, after terminating the retainer of his previous lawyer, the Complainant attended upon the Lawyer about a transfer of land arising out of the Orders. The Lawyer advised the Complainant verbally that he would charge \$750 plus GST and the Complainant paid a \$500 deposit at the Lawyer's request. The Lawyer also advised that a Family Consent Order would be required, costing an extra \$1500 including GST. This cost was agreed to by the Complainant.
3. On 11 March 2015 the parties agreed to vary the Orders by way of a binding financial agreement, which the Lawyer prepared.
4. On 2 April 2015 the Lawyer advised the Complainant that he had changed his original estimate of \$1500 to \$3000 for the Family Consent Order. On 6 April 2015, the Lawyer contacted the Complainant and advised the charge would revert to \$1500.
5. On 7 April 2015 the Complainant executed minutes of consent orders, which varied the Orders. The Lawyer advised that filing and return would take approximately two weeks however, he did not send them to the Court until 17 April 2015.

6. On 21 April 2015:
 - a. the Complainant contacted the Lawyer and was advised that the orders had been “*slightly adjusted*” and required re-signing. The Complainant executed the amended orders on this day and the Lawyer wrote to the Court, advising them to ignore the orders sent on 17 April 2015; and
 - b. the Lawyer received advice from the Court that with regard to the orders sent on 17 April 2015, the Orders could not be changed administratively and that an Application for Consent Orders or an Initiating Application had to be filed.
7. On 23 April 2015 the Court returned the amended orders sent on 21 April 2015 and again advised that they had not been submitted with a completed Application for Consent Orders or an Initiating Application.
8. On 24 April 2015 and 4 May 2015 the Lawyer contacted the Complainant and advised that further documents required signing.
9. On 6 May 2015 the Complainant terminated the Lawyer’s retainer with regard to the family consent order.
10. On 25 May 2015 the Complainant attended upon the Lawyer’s office with regard to the transfer of land and was told that the Lawyer was away but was no longer acting for the Complainant. The Complainant then retained the services of another practitioner.
11. By email dated 6 November 2015 the Complainant requested the Lawyer refund the \$500 paid and by return email from the Lawyer was advised:

“I should be charging you the full fee you are lucky I charged you only \$500.00 you stop the case half way not my fault you refuse to pay the balance of fees thinking it is too high. If you come to my office to collect fees I am going to bill you for the full fees and if you don’t pay it I will sue you for it”.
12. By email dated 9 November 2015 the Complainant again requested a refund of the \$500 and the Lawyer responded by email refusing and threatening to sue the Complainant for defamation.

ISSUES UNDER INVESTIGATION

13. The following issues have been investigated:
 - a. that the Lawyer did not provide the Complainant with a costs disclosure;
 - b. that there was a conflict of interest with the Lawyer acting for both the Complainant and his wife;

- c. trust defalcation as the Lawyer did not place the \$500 deposit into a trust account;
- d. that the work performed by the Lawyer fell short of the standard of competence and diligence expected of a reasonably competent practitioner; and
- e. overcharging.

INVESTIGATION

14. On 8 December 2015 the Victorian Legal Services Commissioner (“the Commissioner”) received the complaint.
15. On 16 December 2015 the Commissioner sent an email to the Lawyer forwarding the complaint and sought a response detailing the work performed and invoices rendered.
16. On 1 February 2016 the Commissioner received an emailed response from the Lawyer. In the response the Lawyer stated:
 - a. he increased his fee from \$750 to \$3,000 due to the apparent complexity of the case;
 - b. the Complainant was offended by the increase in fees;
 - c. there remains \$2,500 unpaid fees which he expects the Complainant to pay; and
 - d. the Complainant’s wife attended upon his office on a number of occasions and was advised, through a Vietnamese assistant, the process that was being undertaken. She was referred to another lawyer who provided independent legal advice.
17. On 4 February 2016 the Commissioner sent an email to the Lawyer asking if a costs agreement had been provided to and executed by the Complainant. The Lawyer responded by email on 4 February 2016 advising no costs agreement was provided as “*everything*” was verbal, including the initial fee estimate.
18. By email dated 22 February 2016 the Commissioner requested the Lawyer provide the Complainant’s file for review. The Lawyer complied and his file was received on 23 February 2016.
19. On 11 May 2016 the Complainant advised the Commissioner that the Lawyer was not acting on behalf of his wife but that another lawyer was and that he had never received an invoice from the Lawyer.
20. On 12 May 2016 the Commissioner sent a letter to the Lawyer that gave notice of the decision to investigate, requested a response pursuant to s.371(1) of the Uniform Law and invited him to make any written submissions.

21. On 22 June 2016 the Commissioner received a response from the Lawyer dated 21 June 2016. The response repeated the Lawyer's previous response dated 1 February 2016 and stated further:

- a. although a costs disclosure had not been provided, he had not breached the relevant provision as his fee was \$750 which falls within the exception to the rule and when he increased his fee to \$1,500, this was an estimate only and the work to be performed had arisen from the previous agreement wherein no disclosure was required;
- b. with regard to the standard of work for the binding financial agreement, it was not meant to replace the Order and was intended to be "*a simple one*";
- c. no conflict of interest arose;
- d. no bill had been presented to the Complainant;
- e. the \$500 deposit was not placed into a trust account;
- f. other irregularities had been identified and he acknowledged that these are real and genuine concerns and that his conduct fell short of the rules. As such, he would undertake to address these issues in the future by:
 - i. ensuring all funds received are put into trust;
 - ii. ensuring all clients attend his office and where a conflict of interest arises send one party elsewhere or to sign a consent declaration to act for both parties before proceeding with works; and
 - iii. ensure all forms and documentation are prepared properly and in a timely manner.

22. On 10 August 2016 the Commissioner sent a letter to the Lawyer advising the investigation was ongoing and detailing the following concerns:

- a. failure to provide the Complainant with a costs disclosure;
- b. poor work;
- c. conflict of interest;
- d. trust defalcation; and
- e. charging more than fair and reasonable amount for legal costs.

23. On 31 August 2016 delegates of the Commissioner attended upon the Lawyer and discussed the ongoing concerns arising from the investigation. During this meeting the Lawyer agreed:

- a. his conduct constituted unsatisfactory professional conduct;
 - b. the following Orders would be appropriate:
 - i. pursuant to s.299(e) of the Uniform Law a trust account expert be engaged at the Lawyer's expense to prepare a trust account compliance report and to educate him with how to deal with trust money;
 - ii. the Lawyer refund the Complainant the \$500 deposit;
 - iii. the Lawyer engage, at his cost, a mentor for six months with monthly reporting; and
 - iv. the Lawyer be reprimanded.
24. On 26 September 2016 the Commissioner received the report from the trust account expert which, amongst other things, recommended the Lawyer participate in a trust bookkeeping course.
25. Due to difficulties in retaining a suitable mentor and in light of the expert report, the Commissioner contacted the Lawyer on 17 November 2016 and proposed the following orders, which were agreed to by the Lawyer:
- a. he refund the \$500 deposit to the Complainant;
 - b. he participate in the following courses:
 - i. Bookkeepers Trust Recording Workshop; and
 - ii. Authorisation to Receive Trust Money Course.
 - c. he be reprimanded.
26. On 16 November 2016 the Commissioner sent a letter to the Complainant which gave notice of the proposed determination and invited written submissions about the proposed order.
27. By email dated 28 November 2016 the Complainant advised he agreed with the order proposing he be refunded the \$500 deposit.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

28. On the basis of the available evidence, including the Lawyer's admissions, I find the following proved:
- a. the Lawyer did not provide a costs disclosure to the Complainant pursuant to s.3.4.9 of the *Legal Profession Act 2004* ("LPA");
 - b. on 22 January 2015 the Lawyer received \$500 from the Complainant and did not deposit it into a trust account pursuant to s.3.3.13 of the LPA; and

- c. the work performed by the Lawyer in relation to the binding financial agreement and variously amended consent orders fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner, given:
 - i. several failed attempts were made to amend the orders by consent;
 - ii. the binding financial agreement does not stipulate that it is a Financial Agreement made pursuant to ss.90B – 90D of the *Family Law Act 1975*; and
 - iii. the executed financial agreement on file is not dated nor are there any certificates of advice attached.

RELEVANT LAW

29. The LPA applies to the conduct, the subject of the findings of fact.
30. The conduct occurred between 22 January 2015 and 25 May 2015, when the Complainant first instructed the Lawyer.
31. On 1 July 2015 the *Legal Profession Uniform Law* (“LPUL”) commenced and pursuant to clause 26 of Schedule 4 of Division 7 of the LPUL, I am empowered to continue to deal with a complaint or investigation in accordance with the provisions of the LPA.

CHARACTERISATION OF THE CONDUCT

Costs Disclosure

32. S.3.4.9(1) of the LPA states that a law practice must disclose to a client, amongst other things:
 - a. the basis on which legal costs will be calculated;
 - b. the client’s rights;
 - c. an estimate of the total legal costs or if that is not reasonably practicable, a range of estimates of the total legal costs and an explanation of the major variables that will affect the calculation of those costs; and
 - d. the avenues that are open to the client in the event of a dispute in relation to legal costs.
33. The Lawyer has submitted however, that s.3.4.9 was not applicable, namely as the original fee estimate was \$750 and the subsequent increase related to this estimate, which did not require a costs disclosure.

34. S.3.4.12(1)(a) of the LPA states that disclosure under s.3.4.9 is not required if the total legal costs, excluding disbursements, are not likely to exceed \$750. Further, s.3.4.12(2) states that despite subsection (1)(a), if a law practice becomes aware that the total legal costs are likely to exceed \$750, the law practice must disclose the matters pursuant to s.3.4.9.
35. In this regard, despite the Lawyer's assertion that the original fee estimate was only \$750, this is not supported by the available evidence which demonstrates the Lawyer gave two fee estimates on 22 January 2015, one of \$750 and another of \$1,500, which he later increased to \$3,000.
36. By reason of the above finding of fact, I find that the Lawyer has breached s.3.4.9 of the LPA.
37. S.4.4.4(a) of the LPA prescribes that, without limitation, conduct capable of constituting unsatisfactory professional conduct includes conduct consisting of a contravention of the LPA.
38. Accordingly, this breach constitutes unsatisfactory professional conduct pursuant to s4.4.4(a) of the LPA.

Trust Defalcation

39. S.3.3.13 of the LPA states that as soon as practicable after receiving trust money, a law practice must deposit the money in a general trust account.
40. By his response dated 21 June 2016, the Lawyer admitted to receiving \$500 from the Complainant on 22 January 2015 and not depositing it into a trust account.
41. By reason of the above finding of fact, I find that the Lawyer has breached s.3.3.13 of the LPA.
42. S.4.4.4(a) of the LPA prescribes that, without limitation, conduct capable of constituting unsatisfactory professional conduct includes conduct consisting of a contravention of the LPA.
43. Accordingly, this breach constitutes unsatisfactory professional conduct pursuant to s4.4.4(a) of the LPA.

Poor Work

44. S.4.4.2 of the LPA states unsatisfactory professional conduct includes conduct in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner.
45. By reason of the above finding of fact, namely that the work performed by the Lawyer in relation to the binding financial agreement and variously amended consent orders included:

- i. several failed attempts to amend the orders by consent;
- ii. the binding financial agreement did not stipulate that it was a Financial Agreement made pursuant to ss.90B – 90D of the *Family Law Act 1975*; and
- iii. the executed financial agreement on file was not dated nor were there any certificates of advice attached

I find this conduct constitutes unsatisfactory professional conduct pursuant to s.4.4.2 of the LPA.

DETERMINATION

46. In light of the above and having considered all of the evidence and relevant law, I determine that it is fair and reasonable in all the circumstances to make the order detailed above.

APPEAL

47. Pursuant to s.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 s.299 of the Uniform Law.



Michael McGarvie
Victorian Legal Services Commissioner

Date: 17 March 2017