

NOTICE OF DETERMINATION

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

Complainant: [REDACTED] (“Complainant”)
Respondent Lawyer/Law Practice: [REDACTED] / [REDACTED] (“Lawyer”)
Ref: [REDACTED]

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 order –

The Lawyer is cautioned pursuant to s.299(1)(a) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. The Lawyer acted for a client in a property settlement matter against her former de facto husband, who is represented by the Complainant;
2. by letter dated 30 May 2016 the Lawyer provided a written Undertaking to the Complainant that the net proceeds of sale of his client’s property would be retained in his trust account pending the resolution of the Complainant’s client’s claim by agreement or Court Orders;
3. by email dated 1 June 2016 the Complainant stated that before he was able to confirm acceptance of the written Undertaking, he required a settlement statement which set out the expected quantum of net proceeds of sale and an itemised list of proposed disbursements;
4. by letter dated 2 June 2016 the Lawyer provided a draft Settlement Statement to the Complainant which detailed the net proceeds of sale at \$52,131.40;
5. by letter dated 29 June 2016 the Lawyer advised the Complainant that he was holding \$109,617.03 in trust as the net proceeds of sale;
6. by letter dated 12 September 2016 the Lawyer advised the Complainant that the amount being held in trust was \$84,617.03, not \$109,617.03 as previously advised; and
7. by letter dated 23 September 2016 the Complainant sought a written explanation as to the difference in the amount held in trust, noting this appeared to be a breach of the Undertaking.

ISSUES UNDER INVESTIGATION

8. The complaint raised the concern that the Lawyer had breached an Undertaking provided to the Complainant.

INVESTIGATION

9. On 10 October 2016 the Victorian Legal Services Commissioner (“the Commissioner”) received the complaint and subsequently requested from the Complainant copies of documents referred to in the Complaint.
10. On 2 November 2016 the Commissioner sent a letter to the Lawyer that gave notice of the complaint, requested a response pursuant to s.371(1) of the Uniform Law and invited him to make any written submissions.
11. On 10 November 2016 the Lawyer contacted the Commissioner and admitted he had breached the Undertaking and acknowledged it was a serious misjudgment on his behalf. He advised there were mitigating circumstances and he would make the appropriate submissions.
12. On 16 November 2016 the Commissioner received a response from the Lawyer which acknowledged, without reservation, that his actions represented a significant error of judgment, his conduct was unsatisfactory and he accepted the need for the investigation.
13. The Lawyer submitted that the only possible explanation for his actions was that he was undergoing a very stressful period. His secretary/office manager of more than 20 years had retired at the start of 2016 and he had been unable to find a suitable replacement and he had begun to experience health problems, ultimately being admitted for major surgery in July 2016. The Lawyer noted that on 28 August 2016 his client requested he release \$25,000 from Trust and he did so, contrary to the Undertaking.
14. On 21 December 2016 the Commissioner sent a letter to the Lawyer that gave notice of the results of its investigation to date, its concerns with his conduct and invited written submissions as to whether the conduct amounted to unsatisfactory professional conduct or professional misconduct.
15. On 18 January 2017 the Lawyer provided a response which noted:
 - a. he had sought independent legal advice and his response had been prepared with the assistance of counsel;
 - b. with “*considerable remorse*”, he admitted he had failed to honour an Undertaking to another practitioner and he unreservedly apologised to the Complainant and his client for his error;
 - c. he did not deliberately breach the Undertaking as the failure was due to his error in not adequately marking his file;
 - d. this error was as a result of his medical condition at the time, occurring four weeks after major surgery and due to the lack of support in the office;
 - e. none of the parties involved had been financially impacted by the conduct and he would be willing to replace the \$25,000 from his own personal funds;

- f. he had taken a number of steps to ensure such conduct does not occur again, including attaching a large coloured notice to the front of a file warning of the existence of an undertaking, managing his medical condition, addressing staffing issues and reducing his workload; and
 - g. he accepts his conduct represents unsatisfactory professional conduct and the time, cost, embarrassment and distress of the investigation provided personal deterrence and prompted him to improve his operating systems.
16. On 10 February 2017 the Commissioner sent a letter to the Lawyer and the Complainant which gave notice of the proposed determination and invited written submissions about the proposed order.
17. By letter dated 15 February 2017 the Lawyer advised that he accepted the proposed determination. The Commissioner has not received any further submissions from the Complainant.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

18. On the basis of the available evidence, including the Lawyer's admissions, I find the following proved:

By letter dated 30 May 2016 the Lawyer provided a written Undertaking to the Complainant that the net proceeds of sale of his client's property would be retained in his trust account pending the resolution of the Complainant's client's claim by agreement or Costs Order.

By letter dated 29 June 2016 the Lawyer advised the Complainant that he was holding \$109,617.03 in trust as the net proceeds of sale.

On 29 August 2016 the Lawyer's client requested a release of \$25,000, which the Lawyer provided from the net proceeds of sale, thus breaching the Undertaking.

RELEVANT LAW

19. The Uniform Law and the *Legal Profession Uniform Law Solicitors' Conduct Rules 2015* (Victoria) ("the Conduct Rules") apply to the conduct, the subject of the findings of fact.
20. The conduct occurred on 29 August 2016 when the Lawyer released \$25,000 to his client from the net proceeds of sale, contrary to the terms of the Undertaking.

CHARACTERISATION OF THE CONDUCT

21. Rule 6.1 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* states that a solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of it, unless released by the recipient or by a court of competent jurisdiction.
22. The Lawyer has admitted that after providing the Undertaking to the Complainant to hold \$109,617.03 on trust, he released \$25,000 from this amount to his client, in breach of the Undertaking.

23. By reason of the above finding of fact, I find that the Lawyer has breached Rule 6.1 of the Conduct Rules.
24. S.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.
25. Accordingly, this breach constitutes unsatisfactory professional conduct pursuant to s.298(b) of the Uniform Law.

DETERMINATION

26. 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

27. 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: 21 March 2017