

NOTICE OF DETERMINATION

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

Complainant: [REDACTED]

Respondent Lawyer/Law Practice: [REDACTED]

Ref: [REDACTED]

ORDERS

Pursuant to section 299(1) of the *Legal Profession Uniform Law (Victoria)* ("Uniform Law"), I have decided that [REDACTED] of [REDACTED] has engaged in unsatisfactory professional conduct and I make an order as follows—

[REDACTED] undertake two (2) additional hours of Continuing Professional Development ("CPD") training pursuant to section 299(1)(e) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. The complaint of [REDACTED] of [REDACTED] ("the complainant") was received on 5 November 2015 ("the complaint"), in which the complainant stated that she and [REDACTED] were acting for the first and second respondents in proceeding number [REDACTED] before the Family Court of Australia. On 28 October 2015 in the course of this proceeding, the complainant and [REDACTED] had a telephone conversation ("the conversation") during which the complainant was concerned that as the call progressed, [REDACTED] raised his voice and then interrupted her and called her a "stupid f [REDACTED] b [REDACTED]".

INVESTIGATION

2. The complainant was given notice of the decision to investigate the complaint in a letter dated 18 November 2015. [REDACTED] was given notice of the complaint and invited to provide a submission in response to the complaint.
3. On 8 December 2015, [REDACTED]'s written submission was received along with a number of attached documents, namely email correspondence between [REDACTED] and the complainant from 23 to 28 October 2015 and [REDACTED]'s file note of the conversation. I note [REDACTED] stated the following in his submission:
 - During the conversation the complainant was "insistent" that he prepare Minutes of Order for the settlement conference the next day; however he indicated this would be difficult as he was very busy.
 - He admitted to raising his voice and told the complainant she was "being unreasonable".
 - He admitted to saying the words "stupid f [REDACTED] b [REDACTED]" but believed he had terminated the call prior to expressing this.
 - When he realised the complainant heard him, he terminated the call. He then recollected himself, called the complainant and apologised. The complainant did not accept his apology. On the same day, he sent an email to the complainant

apologising a second time and agreed to draft the Minutes of Order. The complainant responded via email that she did not accept his apology.

- He said he was “genuinely horrified” the complainant heard his comment.
 - He said he had been dealing with personal health issues at the time.
4. On 13 January 2016 [REDACTED] of this office met with [REDACTED] to discuss the complaint.
 5. On 14 January 2016 [REDACTED] was provided written notice of my likely decision and was given an opportunity to provide any further submissions. On the same date a letter was sent to the complainant attaching [REDACTED]’s submission dated 8 December 2015 and inviting her to provide comment.
 6. On 25 January 2016 the complainant provided her comments to [REDACTED]’s submission in writing, from which I note the following:
 - The complainant expressed disappointment with the “general tone” of [REDACTED]’s submission by reason that he suggested he was more concerned that the complainant heard the remark and not that it was made at all.
 - The complainant did not accept [REDACTED]’s belief he had terminated the conversation.
 7. On 1 February 2016 [REDACTED] provided a further submission, inwhich he stated:
 - He again said he was experiencing mental health issues at the time and had not been taking his prescribed medication contrary to medical advice.
 - His said his comment was not intended to be heard by the complainant and must be distinguished from “deliberate intended conduct”.
 - He submitted that his conduct does not meet the threshold of unsatisfactory professional conduct.
 - He asked that I take into consideration his apologies to the complainant, his willingness to discuss ways to improve his communication, his completion of a CPD course regarding “handling difficult clients”, his intention to complete a further CPD course on this topic and changes made to his practice management as a result of this incident.
 - He made a submission as to his character and fitness to practice.
 - He said he would continue to use every endeavour to ensure his communication at all future times remained courteous and respectful in dealing with other practitioners.
 - He expressed preference for the complaint to be withdrawn.
 8. On 19 February 2016 [REDACTED] of this office spoke with [REDACTED] via telephone, where [REDACTED] was given notice of my proposed determination and she and [REDACTED] identified two (2) CPD courses that [REDACTED] would attend to satisfy the proposed order. On 22 February 2016 [REDACTED] provided booking confirmations for these courses.
 9. On 24 February 2016 [REDACTED] gave notice of my proposed determination to the complainant via telephone, to which the complainant indicated her satisfaction.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

10. The issue raised which was under investigation was whether [REDACTED] called the complainant a “stupid f [REDACTED] b [REDACTED]” via telephone prior to terminating this call on 28 October 2015, and whether his communication with the complaint was discourteous. By reason of the evidence before me, as outline above, I find this issue proved.

CHARACTERISATION OF CONDUCT

11. Rule 4.1.2 of the *Legal Profession Uniform Law Solicitors' Conduct Rules 2015* (Vic) (“the Conduct Rules”) prescribes that a solicitor must be honest and courteous in all dealings in the course of legal practice.

12. 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.

13. By reason of the above finding of fact, I find that [REDACTED] has breached rule 4.1.2 of the Conduct Rules requiring a solicitor to be courteous in all dealings in the course of legal practice.

14. I have had regard to analogous previous decisions of this office and decisions of the Victorian Civil and Administrative Tribunal (“VCAT”) as to whether conduct of this nature amounts to either unsatisfactory professional conduct or professional misconduct as defined in sections 296-298 of the Uniform Law. Of the decisions I have considered, conduct of this nature has 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

15. Of the decisions I have considered, a range of sanctions have been ordered including attendance at relevant CPD courses, apology and caution. In making a decision regarding this I note that various factors have been taken into account including mitigation and prior disciplinary findings.

16. I have taken into account the following mitigating factors in making the above order:

- [REDACTED] apologised both via telephone and via email after the conversation;
- [REDACTED]'s admitted to the conduct of concern;
- [REDACTED] has demonstrated an openness and willingness to improve his communication by having enrolled in relevant CPD courses of his own initiative and has been open to CPD courses suggested by [REDACTED]; and
- [REDACTED] has amended his practice management processes regarding receiving telephone calls as a direct result of the complaint in that an employee will answer all telephone calls and take a message, which prevents [REDACTED] having to speak to people when he is unprepared. This demonstrates a level of recognition of the factors underlying the complaint and pro-activeness to improve and prevent future complaints of a similar nature.

17. I have also considered the following aggravating factors:

- [REDACTED] has a prior disciplinary record dating from 1997 and of concern are a number of previous complaints about conduct of a similar nature, including one (1) previous finding of unsatisfactory professional conduct, as well as a previous visit conducted by my officers to [REDACTED]'s office on 27 February 2014 with the purpose of discussing his pattern of communication.

18. In the light of the above considerations, I find that the most appropriate outcome with the purpose of educating and improving [REDACTED]'s professional communication is to order that he undertake relevant further training.

I note that [REDACTED] has agreed to undertake and has enrolled in the following CPD courses totalling 4 ½ hours of additional CPD points in order to satisfy the order:

1. "Core Competencies – Confident Communication" on 1 March 2016 from 5.30-7.00pm; and
2. "CPD Intensive" including "Managing painful and demanding clients – what to do when you are at your wits' end with poor client behaviour" on 16 March 2016 from 1.30-4.30pm.

DETERMINATION

19. 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

20. 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

21. 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: