

NOTICE OF DETERMINATION

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

Complainant:	██████████
Respondent:	Anita Aarons
First Law Practice:	Evans Ellis Lawyers
Second Law Practice:	Bancroft Lawyers
Ref:	██████████

ORDERS

Pursuant to s299(1) of the Uniform Law, I have decided that the Respondent has engaged in unsatisfactory professional conduct in respect of:

- (i) Failing to provide the Complainant with adequate costs disclosure and costs update pursuant to section 174 of the Uniform Law.

And I make the following order –

Reprimand pursuant to section 299 (1)(b) of Schedule 1

- (i) Failing to notify the Complainant that she would not be able to provide her with advice regarding possible legal action against ██████████ (the Complainant's previous lawyer) because she was principal of Evans Ellis Lawyers (the first law practice), and had been the supervisor of the Complainant's previous lawyer, at the time of the conduct complained of.

And I make the following order –

Reprimand pursuant to section 299 (1)(b) of Schedule 1

STATEMENT OF REASONS

BACKGROUND

The Complainant says she engaged the Respondent to act for her in respect of a dispute regarding a commercial lease (the dispute was between the Complainant's company and ██████████ Pty Ltd, the landlord). She states that she engaged the Respondent to provide her with advice regarding possible action against her previous lawyer, who had acted for her in respect of a purchase of a business and in respect of lease negotiations.

ISSUES UNDER INVESTIGATION

The following allegations were investigated:

- (1) (i) that the Respondent acted in the presence of a conflict of interest by attempting to dissuade the Complainant from taking action against the Complainant's previous lawyer; and

- (ii) that the Respondent failed to notify her that the Complainant's previous lawyer was at that time employed by Bancroft Lawyers (the second law practice). The Respondent was at the time of this advice (and continues as) the principal of the second law practice;
- (2) that the Respondent provided the Complainant with inadequate advice and representation in respect of the Small Business Commissioner mediation;
- (3) that the Respondent failed to arrange for the removal of the debenture in a timely manner;
- (4) that the Respondent advised the Complainant not to proceed with legal action, on the basis that any action would be risky. The Complainant claims that she received no clear advice as to why action would be risky or why her only options were to sell the business – via a 'fire sale' – or to file for bankruptcy; and
- (5) that the Respondent provided the Complainant with inadequate costs disclosure/update of costs. The Respondent provided the Complainant with a costs estimate of \$8,000.00; the Complainant ultimately received an account of \$18,000.00.

INVESTIGATION

The matter was investigated with both the Complainant and the Respondent providing comments and submissions regarding the allegations. In addition, the Complainant attended the office on two occasions to meet with the Investigations Officer. Various documents were also obtained, from the Complainant, the Respondent and third parties.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

(1) Conflict of interest

- (i) The Complainant claims that the Respondent acted in the presence of a conflict of interest by dissuading her from taking action against the Complainant's previous lawyer. At the time of the conduct complained of the Complainant's previous lawyer was employed at the first law practice and had acted for the Complainant in respect of her purchase of the business "[REDACTED]" (the business) ([REDACTED] pertains to the complaint made by the Complainant about the manner in which her purchase of the business was handled, mainly by the Complainant's previous lawyer).

The Complainant claims that the Respondent recommended to her that "*based on my current financial position... my best option is to sell the business as a fire sale or apply for bankruptcy...*"

She also claims that the Respondent provided her with advice that she would not be in a position to take action against the Complainant's previous lawyer

The Respondent stated that the Complainant had told her – during their first meeting – that she was unhappy with the manner in which the first law practice had handled her purchase of the business. The Respondent states that she

recalls advising the Complainant at the time that she *was unable to comment on that issue*.

I sought further information from the Respondent as to what advice she had provided the Complainant with regarding possible action against the Complainant's previous lawyer. In her response dated 23 November 2015, the Respondent simply states that she did not provide the Complainant with any advice.

██████████, a friend of the Complainant, recalls attending the Respondent's office with the Complainant for a meeting. He has, however, been unable to recall whether the Respondent advised the Complainant against suing the first law practice or the Complainant's previous lawyer.

There are no file notes on the Complainant's file showing that the Respondent provided the Complainant with advice regarding possible action against the Complainant's previous lawyer or against the first law practice. Nor is there a note which recorded that the Respondent dissuaded the Complainant from pursuing action against her previous lawyer or the first law practice.

Finding

There is no evidence which establishes the Respondent endeavoured to dissuade the Complainant from pursuing legal action against the Complainant's previous lawyer.

- (ii) The Complainant says that "...[The Respondent] did not advise me that [the Complainant's previous lawyer] was employed by [the second law practice] at the time of this discussion."

In her letter to us dated 28 September 2015, the Respondent denied that the Complainant's previous lawyer was an employee during the period that the Complainant was a client of the second law practice: "[the Complainant's previous lawyer] was not an employee during the period that [the Complainant] was a client of [the second law practice]. Accordingly there was nothing to disclose".

I understand that the Complainant engaged the Respondent to act for her in about July 2011 until November 2012. A search of the records of the Legal Services Board shows that the Complainant's previous lawyer was an employee solicitor of the second law practice for a period of approximately three months, from 26 September 2011 until 9 December 2011.

The Complainant has produced two emails, which are dated 26 September 2012 and 10 January 2013 from the Respondent to the Complainant's previous lawyer. The signature panels of the emails note that the Complainant's previous lawyer is a 'Consultant' at the second law practice. In a subsequent letter of 30 June 2016 the Respondent confirms that the Complainant's previous lawyer was a contract solicitor of the second law practice at the time of seeking the advice.

In her response of 22 August 2016 the Respondent denies that the Complainant specifically referred to the Complainant's previous lawyer in her enquiry regarding possible action against the first law practice. It would be surprising if

the Complainant had not specifically brought up the Complainant's previous lawyer, being the person with the care and conduct of her matter when discussing the quality of service she had received.

I note that the Respondent goes on to say that the Complainant was aware – or ought to have been aware – that the Complainant's previous lawyer was employed by the second law practice. I note that the Complainant's previous lawyer's name quite clearly appears in the Costs Agreement document.

The Respondent denies that she supervised the Complainant's previous lawyer. I am not satisfied that this is correct, given that the Complainant's previous lawyer himself, during an interview at this office about another matter ([REDACTED]), confirmed that she was his supervisor. I also note that The Respondent's name appears on the correspondence to and from the Complainant regarding the lease.

Finding

There is no positive proof that the Respondent sought to hide the previous lawyer's employment at the second law practice from the Complainant.

The Respondent did however, fail to give the Complainant clear advice at the time she was first approached regarding possible action against the first law practice or the Complainant's previous lawyer. The Respondent failed to explain why she was not able to comment on the matter. I also find that the Respondent failed to recommend that the Complainant obtain independent legal advice in respect of the matter. Her failure to do so amounts to unsatisfactory professional conduct.

(2) Small Business Commissioner mediation

The Complainant claimed that the Respondent provided her with inadequate advice and representation in respect of the mediation. In particular she claims that the Respondent arrived at mediation without the relevant files and had to rely on the file of the landlord's solicitor, which she states, instantly placed her at a disadvantage.

The Respondent denies that she provided the Complainant with inadequate representation. She states that the Complainant contacted her office on or around 5 September 2012 in relation to the mediation scheduled with the Small Business Commissioner, which was due on 11 September 2012.

The Complainant was provided with a Costs Agreement. The Costs Agreement notes that [REDACTED], an employee lawyer at the second law firm, had the care and conduct of this matter and the Agreement was hand-amended to reflect her hourly rate of \$200.00 plus GST, and also to reflect that costs could be paid by the Complainant pursuant to a payment arrangement. The Complainant signed and dated the costs agreement on 5 September 2012.

The employee lawyer provided this office with information regarding her knowledge of this matter. She expressed surprise about the complaint, given the good relationship she says she had with the Complainant during the course of her matter and the amount of work she put into it.

In her communications with this office, the employee lawyer notes:

- (i) she properly prepared for the mediation before the Small Business Commissioner. She recalls referring to her notes during the course of the mediation, as well as the chronology she had prepared;
- (ii) the landlord's representative strongly contested all claims that the Complainant made;
- (iii) both she and the Small Business Commissioner worked to facilitate a satisfactory result but this was not achieved, at least not to the Complainant's satisfaction (as the Complainant did not obtain a commercial benefit from the mediation); and
- (iv) the Complainant appeared to have great difficulty understanding the litigious process, in particular the fact that she believed a commercial benefit was a reasonable expectation – the employee lawyer notes that the Complainant expected "*that her opponents ... would just write her a cheque on the day*".

The file regarding this matter contains a number of documents which are marked as being "*The notes prepared by [the employee lawyer] in respect of the mediation*". The employee lawyer stated that she did prepare thoroughly for the mediation and a significant number of the employee lawyer's notes for the mediation are present on the file. The employee lawyer has also stated that she recalls attending the mediation referring to her notes.

I note that the Terms of Settlement (which are undated) appear reasonable and do not penalise the Complainant. The Terms provide for the tenant to sell its assets to [REDACTED] Pty Ltd ([REDACTED]) and for [REDACTED] to have a lease that will allow it to conduct business from the premises. The Terms provide that the landlord will use its reasonable endeavours to finalise a transfer of lease or a new lease. Once transfer or the new lease is finalised, the landlord is to release the Complainant from all claims, suits, demands and actions.

The Respondent has suggested that the Terms signify a "successful outcome" for the Complainant.

Finding

I am satisfied that the Complainant was provided with advice in respect of the mediation, that the employee lawyer prepared for the mediation, and that the Terms that were agreed upon were not unreasonable, particularly given the animosity between landlord and tenant (the Complainant).

(3) The Debenture Agreement

The Complainant claimed that the Respondent failed to make timely arrangements for the removal of the debenture. A charge on the property of [REDACTED] Pty Ltd was lodged 10 January 2012 in favour of [REDACTED] Pty Ltd.

By way of letter dated 14 September 2012, the Respondent wrote to [REDACTED] with [REDACTED] (the landlord's lawyer), about the nature of the debenture. This letter is followed by an email from the employee lawyer to the Complainant on 19 September 2012 about the debenture, specifically about the further enquiries that she was making with regards to the debt.

I understand that the Complainant paid the monies owing to the landlord – the subject of the debenture – on or about 22 October 2014. She shortly thereafter notified the Respondent that the debt had been settled.

The Respondent states that she was unable to arrange for the removal of the debenture because the Complainant terminated their retainer before it could be finalised. It appears that the Complainant terminated the Respondent's retainer on 22 November 2012.

The Respondent states that her firm wrote to the landlord's lawyer by way of letter dated 5 November 2012 confirming that the Complainant had made full and final payment of all monies owed and as such the Debenture Agreement was at an end. The landlord's lawyer did not acknowledge their letter before the end of the second law practice's retainer and as such the Respondent was unable to arrange for the removal of the debenture.

Finding

I am not satisfied that there was an inordinate delay by the Respondent in attending to this matter, particular given the letter to the landlord's lawyer dated 5 November 2012. Even if it was shown that the Respondent failed to act in a timely manner in this respect, I am not satisfied that this would be a serious enough breach to amount to a disciplinary offence.

(4) Advice about legal action

The Complainant claims that the Respondent failed to provide her with adequate advice regarding possible legal action against the Complainant's previous lawyer and the landlord. She claims that the Respondent merely advised her not to proceed with any legal action, on the basis that any action would be risky given her particular circumstances. The Complainant claims that she received no further information from the Respondent as to why the action would be risky and why she should file for bankruptcy. She complains that the Respondent did not put her advice in writing, as she had requested.

The Respondent confirms that the Complainant attended her offices on 24 October 2012 with [REDACTED]. During the meeting the Complainant and [REDACTED] mentioned a number of possible avenues of action, including litigation against the landlord and bankruptcy. She goes on to say that she was not instructed to provide written advice.

It has been suggested to the Respondent that best practice dictates providing written advice following a meeting with clients. The Respondent has acknowledged this but has said that, as often happens in practice, the client may not want to pay for written advice and will specifically instruct that they do not require such advice, which is what happened here.

The Respondent goes on to say that she cannot recall the advice she provided the Complainant at their meeting of 24 October 2012, as she cannot locate the notes made by the employee lawyer during the meeting.

Finding

There is insufficient evidence to establish that the Respondent's conduct fell short of the standard of competence and diligence expected in respect of advice given.

(5) Costs Disclosure

The initial costs estimate was provided to the Complainant on 5 September 2012. An updated cost estimate was provided on 16 September 2012, estimating costs of \$8,000.00. The Complainant eventually received account/s totalling \$18,000.00.

The Respondent claims that she provided the Complainant with updated costs estimates verbally. She also points out that she provided the Complainant with regular tax invoices and the Complainant continued to instruct her. The Respondent states that not until her engagement was terminated did the Complainant raise the issue of costs.

The Respondent (in her informal response to my letter foreshadowing the likely determination) said that she failed to receive payment for even the amount she had specified in the Costs Agreement (\$8,000.00); she does however, acknowledge that she billed more than the amount that had been disclosed.

Finding

I am satisfied that there has been a breach of the requirement to provide appropriate costs disclosure and an updated costs estimate in writing. The Respondent's failure to provide the Complainant with a written update of costs constitutes a disciplinary breach.

RELEVANT LAW

Section 299(2)(b) of the Uniform Law

DETERMINATION & REASONS

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

CHARACTERISATION OF THE CONDUCT

I determine that the conduct – as described above in paragraphs (i) and (ii) of 'Orders' – falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer and as such constitutes unsatisfactory professional conduct. I am not satisfied that the conduct fits within the definition of either a substantial or consistent failure or justifies a finding that the lawyer involved is not a fit and proper person to engage in practice.

The conduct itself, although serious, is not so egregious as to be characterised as capable of constituting professional misconduct. In addition, the Respondent has co-operated with this office during the course of the investigation, providing her answers in a timely manner and if unable to provide the answers as and when required has been in contact with this office. The Respondent has not had a substantiated complaint against her in the last five years.

APPEAL

Pursuant to Section 314 of the Uniform Law, a respondent lawyer or a legal Respondent 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 s299 of the Uniform Law.



Michael Keith McGarvie
Victorian Legal Services Commissioner
CEO of the Victorian Legal Services Board

Date: 22 November 2016