

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) ("the Uniform Law"), I have decided that [REDACTED] has engaged in unsatisfactory professional conduct and I make the following orders –

- a) [REDACTED] is cautioned pursuant to section 299(1)(a) of the Uniform Law; and
- b) [REDACTED] is to apologise to [REDACTED] pursuant to section 299(1)(c) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. The complaint of [REDACTED] was received on 12 October 2015 about [REDACTED] of [REDACTED].
2. [REDACTED] is a former client of [REDACTED]. [REDACTED] engaged [REDACTED] on 25 March 2014 to handle her compensation claim against [REDACTED] ("[REDACTED]") with the insurer [REDACTED] ("the claim"). [REDACTED] had commenced negotiations with [REDACTED] prior to engaging [REDACTED] and instructed him to take over. [REDACTED] also instructed [REDACTED] to institute proceedings against [REDACTED] should the claim fail to settle by the limitation date, 8 October 2014.
3. After contacting my office [REDACTED] terminated [REDACTED] retainer on 26 November 2015.

ISSUES UNDER INVESTIGATION

4. The concerns [REDACTED] raised in the complaint and which have been investigated are:
 - a) The limitation date passed and the claim had not settled, nor had proceedings been instituted;
 - b) [REDACTED] did not provide her with updates as to the progress of the claim despite her requests for updates;
 - c) [REDACTED] did not respond to her communications adequately; and
 - d) [REDACTED] did not respond to communications from [REDACTED], loss assessor for [REDACTED].

INVESTIGATION

5. [REDACTED] was given notice of the complaint and invited to provide a submission in response to the complaint in a letter dated 1 December 2015.

6. Prior to the letter dated 1 December 2015 and on 18 January 2016, [REDACTED] acknowledged to [REDACTED] of my office on a number of occasions via telephone that he had not been thorough, had not followed through, had not acted promptly and had not been willing to work on [REDACTED] file. He accepted the concerns raised in the complaint, said he had no good reason for his conduct and recognised his actions were unsatisfactory.
7. On 22 January 2016 [REDACTED] written submission was received. In his submission, [REDACTED] confirmed his acknowledgement of the concerns raised in the complaint. He admitted he did not finalise settlement of the claim as [REDACTED] instructed, did not act with all due expedition and diligence, and did not communicate with [REDACTED] in a timely or professional manner. [REDACTED] said he could offer no adequate explanation for his conduct but submitted he did not intend to cause any detriment to [REDACTED] and that she suffered no real or substantial loss, as [REDACTED] continued to negotiate after the limitation date, resulting in a settlement of the claim for \$25,000 on 3 December 2014.
8. My office reviewed [REDACTED] original file received on 19 January 2016. I note the following documents are relevant to the complaint and include correspondence to which, in my view, [REDACTED] did not respond sufficiently:
 - a) Letter from [REDACTED] of [REDACTED] to [REDACTED] dated 15 April 2014;
 - b) Email to [REDACTED] from [REDACTED] dated 4 June 2014 advising he has not received a response from [REDACTED] to his letter dated 15 April 2014;
 - c) Email from [REDACTED], Legal Secretary, [REDACTED] to [REDACTED] [REDACTED] dated 5 June 2014 forwarding the email from [REDACTED] to [REDACTED] dated 4 June 2014;
 - d) Email from [REDACTED] to [REDACTED] dated 14 June 2014;
 - e) Email from [REDACTED], Clerk, [REDACTED] to [REDACTED] dated 20 June 2014 forwarding the email from [REDACTED] to [REDACTED] dated 20 June 2014;
 - f) Email from [REDACTED] to [REDACTED] dated 2 July 2014;
 - g) Email from [REDACTED] to [REDACTED] dated 2 July 2014 advising he has not received a response to his letter dated 15 April 2014 or to his telephone messages left on 3 and 17 June 2014;
 - h) Email from [REDACTED] to [REDACTED] dated 16 October 2014 raising the lapse of the limitation period;
 - i) Email from [REDACTED] to [REDACTED] dated 24 November 2014;
 - j) Email from [REDACTED] to [REDACTED] dated 10 March 2015 raising the delay in finalising the claim;
 - k) Email from [REDACTED] to [REDACTED] dated 25 July 2015 again raising the delay in finalising the claim;
 - l) Email from [REDACTED] to [REDACTED] dated 4 September 2015; and
 - m) Email from [REDACTED] to [REDACTED] and including [REDACTED] dated 3 December 2015 attaching acceptance of settlement and release documents.
9. On 4 March 2016 [REDACTED] and [REDACTED] were given notice of my proposed determination to caution [REDACTED] and both offered an opportunity to provide any final submissions.

10. On 9 March 2016 [REDACTED] submission was received, expressing that she remained aggrieved by [REDACTED] conduct and that she had not received an apology from him to date.
11. On 21 March 2016 [REDACTED] advised that [REDACTED] did not wish to make any further submissions.
12. On 8 April 2016 [REDACTED] was given written notice that I had revised my proposed determination to include an order that he apologise to [REDACTED], which he accepted. On 21 April 2016 [REDACTED] was given written notice that I had revised my proposed determination. On 9 May 2016 [REDACTED] signed letter of apology to [REDACTED] was received.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

13. On the basis of [REDACTED] admissions and the evidence before me, I find the following proved:
 - a) [REDACTED] accepted but did not follow [REDACTED] instructions to either settle the claim or institute proceedings against [REDACTED] by the limitation date;
 - b) [REDACTED] failure to follow [REDACTED] instructions exposed [REDACTED] to the risk of lost opportunity to settle the claim;
 - c) [REDACTED] failed to adequately advise [REDACTED] with sufficient detail and frequency regarding the work that he performed and the progress of the claim;
 - d) [REDACTED] failed to respond adequately or at all to [REDACTED] correspondence to him or his office, namely her emails dated 4 June 2014, 14 June 2014, 2 July 2014, 16 October 2014, 24 November 2014, 10 March 2015 and 4 September 2015;
 - e) [REDACTED] failed to respond to [REDACTED] for the purpose of progressing the claim, namely a letter from [REDACTED] dated 15 April 2014, telephone messages from [REDACTED] on 3 June 2014 and 17 June 2014 and email from [REDACTED] dated 2 July 2014;
 - f) [REDACTED] conduct at (a)-(e) of this paragraph resulted in delays in progressing the claim, totaling approximately one year and two months from the expiry of the limitation date until the settlement date, or one year and nine months from the date [REDACTED] was engaged until the settlement date; and
 - g) By reason of (a)-(f) of this paragraph [REDACTED] provided inadequate legal services to [REDACTED] in relation to the claim.

CHARACTERISATION OF CONDUCT

14. The complaint is about conduct that occurred between 25 March 2014 and 3 December 2015.
15. Section 27, Schedule 4 of the *Legal Profession Uniform Law Application Act 2014* (Vic) prescribes that complaints are able to be initiated on or after 1 July 2015, the commencement date of the Uniform Law, about conduct that occurred before 1 July 2015. A complaint of this type is handled under the Uniform Law. However, the conduct is measured against the applicable law that existed at the time to determine the relevant disciplinary breach.
16. In my view, the conduct the subject of the findings of fact fall within one of three categories:

- a) Conduct occurring prior to 1 July 2015, to which the *Legal Profession Act 2004* (Vic) (“the 2004 Act”) and the *Professional Conduct and Practice Rules 2005* (Vic) (“the 2005 Practice Rules”) apply;
- b) Conduct occurring on or after 1 July 2015, to which the Uniform Law and the *Legal Profession Uniform Law Solicitors’ Conduct Rules 2015* (Vic) (“the 2015 Conduct Rules”) apply; and
- c) Conduct which is taken to be one continuous block of conduct that has occurred in a period both prior to and after 1 July 2015, to which the Uniform Law and Conduct Rules apply because the applicable date is taken to be the most recent date of the conduct.

17. Therefore, I find that [REDACTED] conduct consists of the following breaches:

- a) [REDACTED] failure to follow [REDACTED] instructions, exposing her to the risk of lost opportunity to settle her claim is in breach of rules 1.2 and 2.2 of the 2005 Practice Rules, being about conduct prior to 1 July 2015. These provisions respectively prescribe a practitioner’s duty to use best endeavours to complete legal work expeditiously and only agree to act for a client when the practitioner reasonably expects to attend to the work with reasonable promptness;
- b) [REDACTED] failure to adequately communicate with [REDACTED] is in breach of rules 4.1.3 and 7.1 of the 2015 Conduct Rules, being about a continuous block of conduct in the course of [REDACTED] retainer. These provisions respectively prescribe a solicitor’s duty to deliver competent, diligent and prompt legal services and to provide a client with clear and timely advice to assist understanding and make informed decisions;
- c) [REDACTED] failure to adequately communicate with [REDACTED] is in breach of rules 1.2 and 2.2 of the 2005 Practice Rules, being about conduct prior to 1 July 2015; and
- d) The delays incurred and [REDACTED] inadequate provision of legal services are in breach of rule 4.1.3 of the 2015 Conduct Rules, being about a continuous block of conduct.

18. By reason of these breaches of the relevant Rules, I find that [REDACTED] conduct is capable of constituting either unsatisfactory professional conduct or professional misconduct pursuant to section 298(b) of the Uniform Law.

19. In determining whether these breaches amount to either unsatisfactory professional conduct or professional misconduct within the definitions under sections 296-298 of the Uniform Law, I have considered analogous previous decisions of my office and decisions of 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. In my view, there is nothing in this matter to suggest that departure from these authorities is warranted

REASONS FOR ORDER

20. Of the analogous decisions I have considered, a caution appears to be the sanction for breaches of standard severity. Sanctions involving imposing conditions upon practicing certificates have only been ordered in serious cases, for instance where the delay has been over a number of years, the lawyer has also been found guilty of charges separate to the issue of delay, the lawyer has a medical condition where supervision at work would be optimal and/or the lawyer has a lengthy prior disciplinary record.

21. Mitigating factors that have been considered for analogous decisions include prior disciplinary records, admission of conduct, extent of loss or damage, written apologies to clients and refunds.
22. In this matter I have taken into account the following mitigating factors:
- a) A number of complaints have been made against [REDACTED] in the past but none have resulted in an adverse disciplinary finding;
 - b) [REDACTED] admitted the concerns in the complaint without excuse in [REDACTED] first conversation with him, as well as in all correspondence with my office thereafter;
 - c) [REDACTED] displayed remorse in the course of his correspondence with my office, expressed no intention or ill will to cause [REDACTED] any detriment and has been open to accepting the consequences of his actions;
 - d) [REDACTED] did not charge [REDACTED] for his services; and
 - e) [REDACTED] was not deprived of a lost opportunity to negotiate the claim with [REDACTED] [REDACTED] after the limitation period and the cessation of [REDACTED] retainer and ultimately secured a settlement of \$25,000.
23. Having considered these mitigating factors, [REDACTED] submission dated 9 March 2016 and the mid-level severity of [REDACTED] conduct, I find that the most appropriate outcome is to order that [REDACTED] be cautioned and that he apologise to [REDACTED].
24. 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.

APPEAL

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

NON-COMPLIANCE

26. A failure to comply with a determination made under section 299 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: 24/05/2016