

## NOTICE OF DETERMINATION

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

**Complainant: Victorian Legal Services Commissioner**

**Respondent Lawyer / Law Practice:** [REDACTED] / [REDACTED]

**Case reference:** [REDACTED]

### Orders

Pursuant to section 299(1) of the Uniform Law, I have determined that [REDACTED] ("[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) By 1 September 2016, [REDACTED] must attend a course relating to general file management pursuant to section 299(1)(e)(i) of the Uniform Law, the particular course to be approved in advance by my office.

### Statement of Reasons

#### **Background**

1. The matters dealt with here arise from my office's investigation of a complaint made about [REDACTED] on 22 October 2014. The case reference of this matter is [REDACTED].
2. In the complainant's complaint, she said the following –
  - She was asked by her granddaughter to lend she and her husband money for their butcher shops.
  - The granddaughter organised a second mortgage on her property for \$90,000.00, to be used as security for the loan.
  - The granddaughter took her to [REDACTED] Law Practice on 29 April 2014 and 5 May 2014, where she saw [REDACTED] and signed loan documents.
  - She thought that the loan was with the Bank of Melbourne, when it was in fact with a private lender at a substantially high interest rate.
  - The loan repayments had not been made by the granddaughter and her husband, as the complainant understood they would be, given that the butcher shops closed shortly after the complainant signed the loan documents.
  - She faced eviction from her property, given she has no capacity to pay the second mortgage.
3. The following issues about [REDACTED] were investigated in the complainant's complaint:

- (a) Whether he showed a lack of care in enabling the complainant to sign loan documents.
  - (b) Whether he sent the complainant a letter on 6 May 2014, following his 5 May 2014 meeting with the complainant, and the granddaughter and her husband, confirming his instructions.
  - (c) Whether he created –
    - I. a handwritten file note; and/or
    - II. a typed file note;

pertaining to his meeting with the complainant, the granddaughter and her husband on 5 May 2014 'after the event'.
4. The complainant said the following in a Witness Statement dated 13 March 2015 in regards to her meeting with [REDACTED] on 29 April 2014 –
- She was not provided with a copy of the documents or any legal advice in relation to the proposed loan by any solicitors at [REDACTED] Law Practice;
  - She cannot recall whether she saw [REDACTED] on this occasion, but certainly did not speak to him.
5. The complainant said the following in a Witness Statement dated 13 March 2015 about her meeting with [REDACTED] on 5 May 2014 –
- While she understood that the loan was intended for the granddaughter, the meaning of the loan documents was not explained to her at any time;
  - When the documents were put in front of her to sign, [REDACTED] did not provide her with sufficient time to read them prior to her signing. She was not taken through the documents and their meaning was not explained;
  - [REDACTED] did not address any of his comments to her at all, but rather directed his sole attention to the granddaughter and her husband. She felt like a third party at this meeting;
  - She was not taken aside and spoken to alone by [REDACTED];
  - She felt as though she was present at the meeting for the sole reason of signing the documents on [REDACTED] instructions;
  - She was not advised of the consequences that affected her as the guarantor or of the ramifications of a default of any repayment that would result from her signing the documents;
  - [REDACTED] did not tell her, the granddaughter or her husband to reconsider signing the loan documents prior to their signing;
  - [REDACTED] did not say that it was in her best interests not to sign the loan documentation;

- [REDACTED] did not advise her of the details of the loan agreement, although she was later advised by the granddaughter that the term of the loan was 12 months;
  - She was not advised by [REDACTED] that she did not have to sign the documents;
  - [REDACTED] did not ask whether she had received independent financial advice.
6. On 30 November 2015, [REDACTED] wrote to my office during that investigation and offered to pay my legal costs in the matter to date, including an Information Technology ("IT") forensic examination report, in circumstances where he agreed and in fact invited my office to engage an expert in order to successfully prove that the word processed file note was created before the complaint was made.
  7. On 16 December 2015, my office was advised by the complainant's lawyer, [REDACTED] of [REDACTED] that the complainant wished to withdraw her complaint after entering into a Deed of Settlement with [REDACTED].
  8. On 17 December 2015, my office wrote to [REDACTED] to confirm the complainant had withdrawn her complaint and the file was closed. [REDACTED] was advised that my office may commence a complaint pursuant to section 266(2) of the Uniform Law.
  9. On 22 December 2015, my office initiated a complaint pursuant to section 266(2) of the Uniform Law based on the events surrounding the complainant's complaint, specifically issue (c) of Paragraph 3 above. [REDACTED] was notified about this by my office by telephone on this date.

## Investigation

10. It is necessary to set out in some detail the investigation of the withdrawn complaint. On 7 November 2014, the complainant's complaint was provided to [REDACTED]. [REDACTED] was asked to provide a full written explanation of his conduct in connection with the issues raised and to include copies of any documents to support his explanation.
11. On 28 November 2014, [REDACTED] responded to the complaint and provided various documents in support of his response. [REDACTED] provided an outline of his version of events of the meetings on 29 April 2014 and 5 May 2014. He did not provide a copy of any file notes from these meetings.
12. On 8 January 2015, my office wrote to [REDACTED]. The content of my office's discussions with the complainant and the granddaughter was raised in this letter. [REDACTED] was offered the opportunity to provide further written submissions and material.
13. On 4 March 2015, [REDACTED] responded to my office's 8 January 2015 letter. [REDACTED] did not provide a copy of any file notes.
14. On 11 March 2015, my office wrote to [REDACTED] and he was asked to provide a copy of the file note in which he claimed –
  - The complainant was asked if she was being coerced into signing or agreeing to any loan or security; and

- He discussed the complainant's capacity to understand and execute any proposed loan and security documents.
15. On 2 April 2015, ██████ responded by providing a copy of a typed file note dated 5 May 2014. In his response, he said *'please see the attached copies of the following documents as requested: file note of the meeting'*.
  16. On 8 April 2015, ██████ met with my office to discuss the complainant's complaint and my office's investigation. At this meeting, ██████ provided my office with his file for this matter, but made no reference to the existence of any other file notes.
  17. At the 8 April 2015 meeting, ██████ agreed to allow an IT computer forensics expert attend his office and examine the computer which, he claimed, was used to draft the file note he provided on 2 April 2015. The purpose of this IT computer forensics examination was to obtain the date that ██████ file note dated 5 May 2014 was created for the purposes of my office's investigation into the complainant's complaint.
  18. On 16 April 2015, IT computer forensics expert, and my office met with ██████ at his law practice. At this meeting, the forensics expert said that it appeared that the 5 May 2014 file note provided to my office by ██████ on 2 April 2015 was last modified on 10 September 2014 at 3.46pm.
  19. At the 16 April 2015 meeting, ██████ left the room following the forensics expert announcing his initial findings and returned with an A4 notebook. ██████ directed my office's attention to a handwritten file note in the A4 notebook, which he said was his original file note from his 5 May 2014 meeting with the complainant.
  20. On 23 April 2015, my office wrote to ██████. A summary of the forensics expert's findings was enclosed to that letter. ██████ was asked to respond to questions about his 5 May 2014 electronic file note and his handwritten file note provided on 16 April 2015.
  21. On 22 May 2015, ██████ responded to my office's 23 April 2015 letter and said the following –
    - He could not recall the specific date the electronic file note dated 5 May 2014 was created.
    - If the file note was created on or around September 2014, it would have been created to print and put on the file or to show to a staff member or colleague if they were required to read the file.
    - The electronic file note was not created specifically on 5 May 2014 as he accommodated the clients and saw them after hours and it was late in the evening when the clients left. He also left the office for the day.
    - He strongly denies comments that he failed to inform my office that the file note was not created on or around the date that it purports to be created. The IT forensic report states that the file note may have been created on 7 May 2014 or in September 2014.
    - He could not recall the specific date the electronic file note was created.

- During the 16 April 2015 meeting, he merely said that the file note must have been created on the date that the forensics expert said.
  - The handwritten file note of the meeting on 5 May 2014 was written at the time of the meeting.
22. On 1 June 2015, my office wrote to [REDACTED] and asked further questions about his 5 May 2014 electronic file note and his handwritten file note provided on 16 April 2015.
23. On 19 June 2015, [REDACTED] responded and reiterated material from his 22 May 2015 response. He also said the following –
- In circumstances where the client has joined him to Court Proceedings, in the event that his Law Practice insurer would have to read the file, the electronic file note would assist.
  - It is common practice for a lawyer to write a file note or notes following a meeting or conversation with a client or colleague on a notepad, email, in a phone message or on the file.

#### **Findings of Fact on Issues under Investigation**

24. The issue raised in the investigation, initiated by my office, was whether [REDACTED] failed in his duty to cooperate in my office's investigation of the complainant's complaint by not providing material relating to his meetings with the complainant on 29 April 2014 and 5 May 2014 when expected and by statutory request by my office. By reason of the evidence before me, as outlined above, I find this issue proved for the following reasons –
- (a) [REDACTED] provided my office with no file note material until his 2 April 2015 letter, despite four statutory requests from my office pursuant to section 4.4.11(1)(a) and/or (b) of the *Legal Profession Act 2014* ("LPA") on 7 November 2014, 8 January 2015, 16 February 2015 and 11 March 2015, and two prior responses from [REDACTED] on 28 November 2014 and 4 March 2015. [REDACTED] was asked to include copies of any documents to support his explanation to the issues raised.
  - (b) The first time my office sighted the A4 notebook was on 16 April 2015. This was the first sighting by my office of the handwritten file note, some five months after the investigation commenced, and following my office's specific request for the original file note. [REDACTED] was aware that an IT computer forensics examination was to be undertaken on 16 April 2015, primarily to obtain material relating to the electronic file note provided to my office.
  - (c) At a meeting on 8 April 2014 with my office, [REDACTED] provided a copy of his file, but made no reference to his A4 notebook file note, which he now claims is the original file note. This led my office to believe that [REDACTED] electronic file note provided on 2 April 2015 was his original file note. There seems to be no explanation why this file note was not attached to the file.
  - (d) [REDACTED] has been unable to provide my office with the specific date that his electronic file note dated 5 May 2014 was created.

### Characterisation of Conduct

25. The complaint is about conduct that occurred prior to 1 July 2015.
26. 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. Further, any order that I make must not be more onerous than an order that was available at the time of the conduct.
27. In my view, [REDACTED] is guilty of unsatisfactory professional conduct pursuant to the definition in section 4.4.2 of the LPA. According to section 4.4.2, unsatisfactory professional conduct includes conduct of a lawyer occurring 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 lawyer.

### Reasons for Orders

28. I have taken into account the following mitigating factors in making the above orders –
- (a) In [REDACTED] letter dated 30 November 2015 –
    - I. He willingly offers to enrol in a course relating to file management in creating file notes;
    - II. He offers to pay for my costs in the matter until the date of his letter, including the costs of the IT computer forensics examination.
  - (b) [REDACTED] agreed to make a payment of \$10,000.00 to the complainant under a Deed of Settlement.
  - (c) [REDACTED] was admitted to practise in the Supreme Court of Victoria on 15 December 2009 and there has been no previous substantiated complaint made about him.
29. In light of the above considerations, I find the most appropriate outcome with the purpose of educating and improving [REDACTED] general file management is to order that he undertake relevant further training. [REDACTED] is required to complete this by 1 September 2016.

### Determination

30. 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 orders details above.

### Appeal

31. 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 the Victorian Civil and Administrative Tribunal (“VCAT”) or seek a review by VCAT of this determination.

**Non-Compliance**

32. 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.



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Michael McGarvie  
**Victorian Legal Services Commissioner**

**Date: 24 June 2016**