

NOTICE OF DETERMINATION

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

Complainant:
Respondent:
Ref:

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-

1. [REDACTED] is cautioned pursuant to section 299(1)(a) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. On 28 September 2015 my office received a complaint ("the complaint") from [REDACTED] ("the complainant") in which the complainant stated that he had engaged [REDACTED] to assist with the administration of his late wife [REDACTED] estate ("the Estate") in or around June 2014. The complainant stated that he and his late wife had previously engaged [REDACTED] to draft their wills and these were held by [REDACTED] along with other safe custody documents, including the certificate of title to their home in [REDACTED] ("the property"). The complainant stated that there had been significant delay in the administration of the Estate on the part of [REDACTED], and that he had made a number of queries over more than a year for updates as to the progress of the matter. On 24 August 2015, [REDACTED] advised [REDACTED] that he could not locate the documents.
2. This complaint relates to conduct that was alleged to have happened before the commencement day of the Uniform Law. Clause 27 of Schedule 4 of the Uniform Law permitted this office to investigate this complaint under Part 5.4 of the Uniform Law.
3. At the relevant times, [REDACTED] did not hold a Victorian practising certificate.
4. Between October and November 2015, my staff liaised with [REDACTED] and [REDACTED] to locate the missing safe custody documents and transfer them to a practising solicitor.

INVESTIGATION

5. The complainant and [REDACTED] were provided with a notice of decision to investigate the complaint and invited to make submissions in response to the complaint.
6. Documents provided by the complainant identified the following:
 - i. On 4 August 2014 and 16 December 2014 the complainant sent [REDACTED] documents by mail relating to shares held by [REDACTED] and documents relating to the transfer of the title of the property.

- ii. On 24 March 2015 [REDACTED] sent the complainant an email acknowledging receipt of his messages and stating that “(f)or some time I have been “snowed under” with work”.
 - iii. On 6 August 2015 [REDACTED] sent the complainant an email and said that he knew the complainant had been trying to reach him but “that has been difficult”. He said that “I have not completed the process for you” and recommended that the complainant “engage another practitioner”. He apologised and advised that he would not be charging the complainant.
 - iv. On 14 August 2015 the complainant sent [REDACTED] an email requesting the return of his safe custody documents and advised that he was “anxious to finalise the estate”.
 - v. On 17 August 2015 [REDACTED] sent the complainant an email and advised that he believed that the documents would be ready later that week for collection.
 - vi. On 24 August 2015 [REDACTED] sent the complainant an email in which he advised that he could not locate his file.
 - vii. On 26 August 2015 the complainant sent [REDACTED] an email and sought confirmation of the safe custody of the documents that he understood were being held for him.
 - viii. On 30 August 2015 [REDACTED] sent the complainant an email and said that he could not locate the files, and that he would need to make an application for a new certificate of title. [REDACTED] requested the provision of further documents from [REDACTED] so that he could draft the application.
 - ix. On 2 September 2015 the complainant sent [REDACTED] the requested documents and expressed his disappointment that the matter had not been finalised.
7. Further information was sought from [REDACTED], the new solicitor engaged by the complainant. On 18 January 2016, [REDACTED] forwarded to my office a copy of the letter and documents sent by [REDACTED] to the complainant on 16 October 2015. The safe custody documents enclosed included:
- i. Certificate of Title Volume [REDACTED] Folio [REDACTED];
 - ii. Death Certificate of [REDACTED];
 - iii. Original Wills of [REDACTED] and [REDACTED] dated 1 March 2004, 17 July 2000, and 3 February 1997;
 - iv. Original Will of [REDACTED] dated 25 February.
8. On 15 February 2016, [REDACTED] written submission was received. I note [REDACTED] stated the following in his submission:
- i. he had “always intended” to transfer the matter on to a “lawyer friend”;

- ii. he received documents relating to [REDACTED] estate for the purpose of viewing them;
 - iii. he had “always intended to have a further discussion with [REDACTED]” in relation to the transfer of the matter;
 - iv. he did not perform any work for the complainant, nor did he charge the complainant for any services provided;
 - v. the delays in the matter were attributable to “business pressure and health concerns”;
 - vi. he acknowledged that he was “remiss in not pursuing the referral to assist [REDACTED]”; and
 - vii. he assured that the documents were held in safe custody.
9. On 15 March 2016, [REDACTED] of this office had a telephone meeting with the complainant to discuss the complaint. The complainant advised [REDACTED] of the following:
- i. he was not aware that [REDACTED] was not entitled to work as a lawyer at any time in his engagement; and
 - ii. he was not made aware at any time that [REDACTED] intended on handing the matter over to another lawyer.
10. On 29 April 2016, the complainant and [REDACTED] were invited to make written submissions under section 299(2)(a) of the Uniform Law. The letter advised that I was considering making an order cautioning [REDACTED], pursuant to section 299(1)(a).
11. On 17 May 2016 this office received written submissions from the complainant. The complainant noted that his matter had been completed and advised that he would be satisfied with the proposed order “on the understanding that his actions could not be repeated”.
12. 20 May 2016 this office received further written submissions from [REDACTED], in which he stated:
- i. he “sincerely regretted the confusion and the delay in respect of [REDACTED] matter”;
 - ii. that he would like to take the opportunity to “apologise to [REDACTED] for the inconvenience caused to him as a result of the manner in which I dealt with the... matter”;
 - iii. he acknowledged that he should have immediately referred the matter on to a legal practitioner;
 - iv. he consented to an order being made under 299(1)(a) of the Uniform Law.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

13. The issue raised which was under investigation was whether [REDACTED] had caused the complainant significant delay to the administration of [REDACTED] estate due to his apparent inactivity and misplacement of the complainant's safe custody documents. By reason of the evidence before me, as outlined above, I find this issue proven.

CHARACTERISATION OF CONDUCT

14. Rule 14.1 of the Conduct Rules requires that a solicitor with designated responsibility for a client's matter must ensure that, upon completion or termination of an engagement, that the client is given any client documents as soon as is reasonably possible when requested to do so by the client.
15. By reason of the above finding of fact, I find that [REDACTED] has breached rule 14.1 of the Conduct Rules.
16. I have had regard to previous decisions of my 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 section 296-298 of the Uniform Law). Of the decisions I have considered, conduct of this nature has been characterised as unsatisfactory professional conduct. I do not propose to depart from these authorities in this case.

OUTCOME

17. A range of sanctions can be ordered under section 299(1) of the Uniform Law. In making a decision, I must take into account any mitigating and/or aggravating factors.
18. I have taken into account the following mitigating factors in making the above order:
- i. [REDACTED] admitted to the relevant conduct and assisted this office diligently in its investigation;
 - ii. [REDACTED] took measures to ensure that the safe custody documents were replaced at no cost to the complainant prior to locating them; and
 - iii. [REDACTED] apologised for the delay and misplacement of documents via telephone and email. I am satisfied on the evidence that [REDACTED] apology is genuine.
19. I have also considered the following aggravating factor:
- i. The complainant was not made aware that [REDACTED] did not have a current practising certificate at the relevant times and was as such not entitled to engage in legal practice. However, as noted in a letter to [REDACTED] dated 29 April 2016, I am not satisfied on the material available to me that he engaged in or represented an entitlement to engage in legal practice such that his conduct amounted to a criminal breach of the Uniform Law
20. In light of the above considerations, I find that the most appropriate outcome is to order that [REDACTED] be cautioned.

DETERMINATION

21. 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

22. Pursuant to section 314 of the Uniform Law, a respondent lawyer or 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

23. Pursuant to section 298(h) of the Uniform Law, 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.



Michael McGarvie
Victorian Legal Services Commissioner

Date: 25/5/2016