

## NOTICE OF DETERMINATION

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

<b>Complainant:</b>	[REDACTED]
<b>Respondent Lawyer/Law Practice:</b>	<b>Ms Tina Armenio of Armenio &amp; Associates</b>
<b>Ref:</b>	[REDACTED]

### ORDERS

Pursuant to section 299(1) of the *Legal Profession Uniform Law* (Victoria) (“the Uniform Law”), I have decided that the respondent has engaged in unsatisfactory professional conduct and I make the following orders –

1. The respondent is reprimanded pursuant to section 299(1)(b) of the Uniform Law.
2. The respondent is to apologise in writing to the complainant, [REDACTED] of Consumer Affairs Victoria (“the representative from CAV”) and [REDACTED] of the Victorian Building Authority (“the Inspector”) within 30 days of the date of this determination pursuant to section 299(1)(c) of the Uniform Law.
3. Pursuant to section 299(1)(e)(i) of the Uniform Law, the respondent is required to undertake the following further education, in addition to her usual continuing professional development (“CPD”) requirements, at her own expense, for the year commencing 1 July 2017 before her local practising certificate is renewed for the 1 July 2018 period, and provide proof of this to the Victorian Legal Services Commissioner (“VLSC”):
  - a. two CPD points in ethics and professional responsibility;
  - b. two CPD points in practice management and business skills; and
  - c. two CPD points in professional skills.

### STATEMENT OF REASONS

#### BACKGROUND

4. The complainant was involved in a dispute with the builder of her property, [REDACTED] (“the builder”), at [REDACTED] (“the property”) in relation to alleged defective building work (“the building dispute”).
5. On or around 23 June 2015, the complainant contacted Consumer Affairs Victoria (“CAV”) and an onsite inspection and conciliation conference was arranged between the parties to take place at the property.
6. On 25 June 2015, the representative from CAV emailed the complainant and the builder outlining that the attendees at the conciliation conference were to be the complainant, the builder, the representative from CAV and the Inspector.
7. On 30 June 2015, the conciliation conference took place from 9.30 am until 2.00 pm with the complainant, the builder, the Inspector, the representative from CAV, [REDACTED] (“the complainant’s support person”) and the respondent in attendance.

## ISSUES UNDER INVESTIGATION

The issues that have been investigated are as follows:

8. Whether the respondent held herself out to be the builder's secretary at the conciliation conference in circumstances where she was attending in her capacity as a lawyer representing him; and
9. Whether the respondent's involvement in the conciliation conference was prejudicial to the interests of the parties and to the conciliation generally.

## INVESTIGATION

10. On 21 September 2016, the VLSC:
  - a. gave notice to the respondent of its decision to investigate the issues outlined above, requested a response from the respondent, including documentation in support, pursuant to section 371(1)(a) and (b) of the Uniform Law.
  - b. sought responses, including documentation in support, from the representative from CAV and the Inspector as to their recollection of the conciliation conference, particularly regarding the attendance of the respondent and the purpose of her attendance, pursuant to section 371(2) of the Uniform Law.
11. On 7 October 2016, the VLSC received a response from the Department of Justice and Regulation on behalf of the representative from CAV. The representative from CAV confirmed that it is standard practice, where a party arrives at a pre-arranged meeting, who has not previously been listed as an attendee, for him to query the attendee's details, including the reason for their attendance. He further stated that it was his recollection that the builder introduced the respondent as his secretary. On this basis, the representative from CAV queried whether the complainant was agreeable to the respondent's attendance to which she agreed. The representative from CAV further recalled that upon the complainant asking the respondent whether she was the builder's lawyer, the response provided was that she was a lawyer but was attending in her capacity as a friend of the builder.
12. On 25 October 2016, the VLSC received a response from the Inspector. The Inspector recalled that the builder introduced the respondent as his secretary. Further, the Inspector's contemporaneous file note from the meeting listed the respondent's attendance as 'secretary'. The Inspector recalled the respondent's response to the complainant's query to be that she was a friend of the builder, was present to provide support, also assisted the builder from time to time in a secretarial role and was also a lawyer.
13. On 2 November 2016, the VLSC received a response from the respondent. The respondent outlined the following:
  - a. a file was opened for the builder's business, '[REDACTED]', on 15 June 2015 and the builder was provided with a standard form costs agreement and costs disclosure statement;
  - b. the builder had requested her attendance at the conciliation conference as a support person and to observe the proceedings;

- c. lawyers were not required to be present as the meeting had no legal standing;
  - d. she believed she could not appear as a lawyer or take part in the conciliation conference because she did not hold the required experience or expertise in building law matters; and
  - e. she did not recall holding herself out to be the builder's secretary and/or employee, nor did she recall the builder stating that she was his secretary.
14. On 3 November 2016, the VLSC requested the respondent's original file for the building dispute pursuant to section 371(1)(a) of the Uniform Law.
15. On 18 November 2016, the VLSC received the respondent's file. The respondent's file contained:
- a. a tax invoice dated 10 July 2015 ("the tax invoice"), which under the professional fees section, the respondent had listed:  

30/06/2015 Attendance on [REDACTED] for conciliation; and
  - b. an email dated 30 June 2015, following the conciliation conference, from the respondent to the builder confirming her advice of that day.
16. On 24 November 2016, the VLSC wrote to the respondent:
- a. giving notice that the VLSC was of the preliminary view that the conduct would likely constitute various breaches of the *Professional Conduct and Practice Rules 2005* ("the PCPR");
  - b. sought any further written submissions or material that the respondent would like taken into account before a decision was made; and
  - c. sought submissions as to which of the proposed orders available under section 299(1) of the Uniform Law would be the most appropriate.
17. The respondent provided her response by way of a letter dated 7 December 2016, in which she relevantly stated as follows:
- a. accepted responsibility for her "error in judgment in thinking she was not obliged to disclose that she was a lawyer at the outset of the conciliation", apologised for this error and stated that she was "remorseful for any ambiguous behaviour throughout this matter";
  - b. she felt under undue pressure from the builder and his wife and accepted responsibility for blurring the line between a longstanding friendship and her duties as a lawyer;
  - c. she charged for her attendance at the conciliation conference "as it took most of the day and it was a period when [her] practice was very busy" and she was of the view it was "fair and appropriate";

- d. had she intended to conduct the case, be actively involved and represent the builder as his lawyer, she would have clearly disclosed that she was a lawyer at the outset;
  - e. acknowledged that her failure to disclose at the outset that she was a lawyer could have the effect of diminishing public confidence in the administration of justice; and
  - f. suggested that a caution pursuant to section 299(1)(a) of the Uniform Law and apology to the complainant pursuant to section 299(1)(c) of the Uniform Law would be appropriate.
18. On 13 January 2017, [REDACTED], Investigations Officer, (“the Investigations Officer”) spoke to the complainant’s support person with respect to his recollection of the conciliation conference. He recalled both the builder and the respondent stating that the respondent was the builder’s secretary.
19. On 17 January 2017, the Investigations Officer spoke to the builder regarding the events that led to the conciliation conference and his recollection of the conciliation conference. His recollection was that the respondent attended in a support capacity only.
20. On 24 January 2017, the VLSC gave notice of the proposed determination pursuant to section 299(2) of the Uniform Law to the complainant and the respondent and invited written submissions about the proposed orders.
21. On 10 February 2017, the respondent submitted that:
- a. her failure to disclose at the outset of the conciliation conference that she was a lawyer was an ‘error of judgment’ based on her understanding that her role was purely supportive and that an ‘error of judgment’ cannot equate to dishonesty;
  - b. she provided the builder with a costs agreement as it is required at the outset of being instructed and rendered an account for her attendance as the conciliation lasted a full day;
  - c. she was not dishonest and did not intend on deceiving anyone as she held the view that as she would not be ‘acting for [REDACTED] in the dispute’, she was not required to disclose that she was a lawyer;
  - d. she did not recall having said “Hello I’m [REDACTED] secretary” and submitted that the builder did not recall introducing her in this manner and if he did, he did so without her knowledge and consent;
  - e. acknowledged that her failure to disclose at the outset that she was a lawyer could have the effect of diminishing public confidence in the administration of justice and stated that she was sorry;
  - f. denied that her attendance was prejudicial to the administration of justice and stated that [REDACTED] did not suffer any loss or damage as a result; and
  - g. a caution pursuant to section 299(1)(a) of the Uniform Law was appropriate.

22. On 3 March 2017, the respondent provided 7 character references, 5 of which were addressed to the Victorian Legal Services Board + Commissioner, and a medical certificate to the VLSC.

### **FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION**

23. On the basis of an extensive review of the respondent's file, the responses received and materials provided from the Inspector, the representative from CAV, the complainant's support person, the builder and the respondent and the interview with the respondent on 19 January 2017, I find the following proved:

- a. the respondent commenced acting for the builder's business on or about 11 June 2015 in relation to the building dispute between the builder and the complainant;
- b. the respondent attended the conciliation conference on 30 June 2015 in her capacity as the lawyer for the builder specifically in relation to the building dispute;
- c. the respondent failed to disclose her role as the builder's lawyer at the outset of the conciliation conference;
- d. the respondent failed to clarify her role during the conciliation conference, which lasted approximately 4 hours;
- e. the respondent confirmed she was a lawyer upon being asked by the complainant whether she was a lawyer nearing the end of the conciliation conference;
- f. the respondent provided legal advice (albeit limited) to the builder following the conciliation conference;
- g. the respondent's conduct in failing to disclose to the parties present at the conciliation conference that she held instructions to act as the builder's lawyer in the particular building dispute caused the complainant, the Inspector, the representative from CAV, the complainant's support person to be misled as to her role at the conciliation conference.
- h. the complainant was disadvantaged by:
  - i. not having the opportunity to have legal representation present in circumstances where the builder did; and
  - ii. not holding all the relevant information when agreeing to the respondent's attendance; and
- i. by reason of the above, the respondent engaged in conduct which was likely to a material degree to be prejudicial to the parties present, prejudicial to the Building Advice and Conciliation Victoria's conciliation process and diminish public confidence in the conciliation process and the administration of justice more generally.

24. I have accepted that the respondent:

- a. held the honest belief at the time that she was attending the conciliation conference as the builder's support person and not in her capacity as a lawyer as:
  - i. the respondent had formed the view as at 30 June 2015 that she did not have the required relevant building law experience to continue acting as the lawyer for '[REDACTED]' in the building dispute;
  - ii. in light of the evidence of the respondent and the builder, the respondent advised the builder that she would be attending the conciliation conference in a support capacity only; and
  - iii. in hindsight, has accepted that this belief was mistaken.
- b. held the view that lawyers were not required to be present as opposed to not being permitted to be present.
- c. felt under undue pressure to attend the conciliation conference with the builder due to the existing friendship between herself and the builder's family.
- d. when asked directly whether she was a solicitor at the end of the conciliation conference, the respondent confirmed that she was.

## RELEVANT LAW

25. The Uniform Law applies to the conduct the subject of the findings of fact pursuant to clause 27 of Schedule 4 of the Uniform Law as the complaint was received after 1 July 2015.
26. The conduct occurred on 30 June 2015, accordingly the PCPR applies, as opposed to the *Legal Profession Uniform Law Solicitors' Conduct Rules 2015* (Victoria) which commenced on 1 July 2015. Rule 30.1 of the PCPR provides that:
  - 30.1 A practitioner must not engage in conduct, whether in the course of practice or otherwise, which is: ...
    - 30.1.2 calculated, or likely to a material degree, to:
      - (a) be prejudicial to the administration of justice;
      - (b) diminish public confidence in the administration of justice.
27. Section 296 of the Uniform Law prescribes that 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.

## CHARACTERISATION OF THE CONDUCT

28. By reason of the above findings of fact, I find that the respondent has breached rule 30.1.2(a) and (b) of the PCPR. These breaches constitute unsatisfactory professional conduct pursuant to section 296 of the Uniform Law.

## **DETERMINATION & REASONS**

29. In making this determination, I have considered analogous decisions of my office and the Victorian Civil and Administrative Tribunal (“VCAT”). Of the decisions considered, conduct of this nature has been characterised as both professional misconduct and unsatisfactory professional conduct depending on the facts of each matter, the intention of the lawyer and whether any dishonesty was involved. In my view, and in the absence of being in a position to make a finding of dishonesty in this matter, there is nothing to suggest that departure from a finding of unsatisfactory professional conduct is warranted.
30. In this matter I have taken into account the following mitigating factors, the respondent:
- a. has no record of previous substantiated complaints;
  - b. provided 7 character references to our office, 5 of which were specifically addressed to the Victorian Legal Services Board + Commissioner in relation to the issues before me;
  - c. provided a medical certificate dated 2 March 2017 which related to the period of time in which the conduct occurred; and
  - d. has shown insight into her error/s and has made active changes, including refusing to act for two friends since the events in question, to prevent future conduct of this nature occurring.
31. 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**

32. Pursuant to section 314 of the Uniform Law, a respondent lawyer may appeal this determination made under section 299 of the Uniform Law.

## **NON-COMPLIANCE**

33. 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:** 28 April 2017