

NOTICE OF DETERMINATION

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

Complainant: [REDACTED]
Respondent / Law Practice: [REDACTED] / [REDACTED]
Case reference: [REDACTED]

Orders

Pursuant to sections 290(2)(e) and 308(3)(b) of the Uniform Law I have decided to make the following order –

A compensation order that the Respondent Lawyer repay the Client \$77.00 following payment by the Client of the Respondent Lawyer's bill dated 29 June 2015.

Statement of Reasons

Background

1. On 29 April 2015, the Complainant's Law Practice wrote to the Respondent Lawyer and advised that it was acting on behalf of their Client. The Complainant's Law Practice requested a copy of their Client's documents together with all files, deeds, Wills and other documents relating to the Estate of his late father ("the Estate").
2. On 1 May 2015, the Respondent Lawyer wrote to the Complainant's Law Practice and enclosed a copy of the Will of the Client and confirmed that he was holding Deeds and a Certificate of Title on behalf of the Client's late father. The Respondent Lawyer requested a certified copy of the current Will and Death Certificate to release the Deeds and a certified copy of the Grant of Probate for releasing the original title.
3. On 8 May 2015, the Complainant's Law Practice wrote to the Respondent Lawyer and asked precisely which documents he had.
4. On 17 June 2015, the Complainant's Law Practice wrote to the Respondent Lawyer and enclosed a certified copy of the Death Certificate of the Client's father.
5. On 1 July 2015, the Respondent Lawyer wrote to the Complainant's Law Practice and enclosed a list of relevant documents. The Respondent Lawyer advised he would release these on payment of his enclosed tax invoice dated 29 June 2015.
6. On 9 July 2015, the Complainant's Law Practice wrote to the Respondent Lawyer disputing the invoice as follows –
 - The Respondent Lawyer's Law Practice was not retained to undertake any legal work;
 - The Client has requested the documents as Executor pursuant to an Authority and there was no basis for any charge.

7. On 21 July 2015, the Complainant's Law Practice advised it was instructed to pay the Respondent Lawyer's tax Invoice of \$77.00, subject to a complaint being made to my office.
8. On 21 July 2015, the Respondent Lawyer wrote to the Complainant's Law Practice and enclosed a summary of his attendances and correspondence.
9. On 20 August 2015, the Complainant's Law Practice made a complaint to my office.
10. From September to February informal resolution was attempted but no resolution was reached between the parties, including the matter being referred to my costs consultant.
11. On 8 February 2016 my office requested the Respondent lawyer to re-issue the bill as an administrative charge based on the advice of my cost consultant. The consultant was of the view that although legal costs could not be charged, an administrative charge could be made.
12. On 9 February the Respondent lawyer provided my office with a re-issued bill as suggested.
13. However it was determined by me that even as an administrative fee, the charge was potentially in breach of the professional conduct rules.
14. On 29 February 2016, my office raised with the Respondent lawyer Rule 16 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* – "Charging for Document Storage" and Rule 37 of the *Professional Conduct and Practice Rules 2005* – "Storage of Client Records" with the Respondent Lawyer. Rule 16 and Rule 37 say as follows –

Rule 16 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*

CHARGING FOR DOCUMENT STORAGE

16.1 A solicitor must not charge:

16.1.1 for the storage of documents, files or other property on behalf of clients or former clients of the solicitor or law practice (or predecessors in practice); or

16.1.2 for retrieval from storage of those documents, files or other property,

UNLESS the client or former client has agreed in writing to such charge being made.

Rule 37 of the *Professional Conduct and Practice Rules 2005*

STORAGE OF CLIENT RECORDS

A practitioner must not make a charge or attempt to do so:

(a) for the storage of documents, files or other property on behalf of clients or former clients of the practitioner or its predecessors in practice; or

(b) for retrieval from storage of those documents, files or other property –

unless the client or former client has agreed in writing to such charge being made.

15. An apology for the erroneous suggestion was given to the Respondent lawyer both by email and by telephone by my staff.
16. Given that neither the Client, nor his late father at the time appear to have agreed to such a charge, the Respondent Lawyer was asked to waive his bill as a result of Rule 16 and Rule 37 above.

17. The Respondent lawyer has not provided any evidence of agreement to the charge in writing and has not indicated a willingness to waive his bill.
18. A proposed determination was foreshadowed to the Respondent lawyer on 16 March 2016 which applied the Rules as set out above.
19. No submissions have been received from the Respondent lawyer.

Issue in Dispute

Whether it is fair and reasonable that the Client pay the Respondent Lawyer's bill dated 29 June 2015 for \$77.00 in all of the circumstances.

Complainant's Case

This is set out above in Paragraph 6 under the heading 'Background'.

Respondent Lawyer's Case

1. He did not charge the Client for retrieving any documents, but because he undertook an investigation;
2. The Client was his client, given the work he said he performed on his behalf;
3. He did not have to advise the Client that he would be charging him – in particular, given the amount he charged;
4. He will not waive the bill.

Relevant Law

Section 290(2)(e) of the Uniform Law.

Section 308(3)(b) of the Uniform Law.

Findings on Issues in Dispute

1. Given the facts above, the Client has suffered a financial loss as a result of paying the Respondent Lawyer's tax invoice dated 29 June 2015.
2. I have made a compensation order pursuant to sections 290(2)(e) and 308(3) of the Uniform Law, and in the interests of justice, for the following reasons –
 - (a) It appears that the Client was not the Respondent Lawyer's client, as:
 - There was no retainer in place between the Respondent Lawyer and the Client;
 - The Respondent Lawyer received a request for documents directly from the Complainant's Law Practice, who were clearly acting on the Client's behalf.

- (b) The Respondent Lawyer does not appear to have provided any notice to the Client's late father at the time, nor to the Complainant's Law Practice subsequently, that he would be charging a fee for their request. The Respondent Lawyer does not appear to have been provided with any consent to charge.
- (c) The Respondent Lawyer is not willing to refund the Client \$77.00.
- (d) The fee is not permitted in accordance with Rule 16 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* – "Charging for Document Storage" and Rule 37 of the *Professional Conduct and Practice Rules 2005*.

Determinations & Reasons

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

Non-compliance

A failure to comply with a determination made under section 290 of the Uniform Law is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of –

- (a) any principal of a respondent law practice; and
- (b) any lawyer involved in the contravention.

Enforcement

A copy of this compensation order may be filed in the Magistrates' Court of Victoria and the order (so far as it relates to any amount payable under the order) may be enforced as if it were an order of the court (section 310 of the Uniform Law).

Michael McGarvie
Victorian Legal Services Commissioner