

NOTICE OF DETERMINATION

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

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

Orders

- 1) Pursuant to section 290(2)(d)(i) of the Uniform Law, I make the following order –

That the Respondent Lawyer undertakes a professional development course with focus on practice management: specifically, appropriate billing and compliance with costs disclosure obligations, to be approved by the Victorian Legal Services Commissioner (“the VLSC”) within 6 months of this date.

- 2) Pursuant to section 290(2)(e) of the Uniform Law, I make the following order –

Under section 308(3) of the Uniform Law, the Respondent Lawyer must **repay \$13,816.00 to the Complainant within 60 days.**

I have made this order in relation to legal costs charged by the Respondent Lawyer to the Complainant regarding the bill dated 30 July 2015, for an amount of \$17,600.00. I consider the amount of legal costs that are fair and reasonable in relation to this bill, pursuant to section 292 of the Uniform Law, to be \$3,784.00 (GST inclusive).

- 3) Pursuant to section 299(1) of the Uniform Law, I find that you engaged in unsatisfactory professional conduct in relation to conduct set out below at paragraph 22 below and in this regard pursuant to section 299(1)(a) of the Uniform Law I make an order that you are cautioned for this conduct.

Statement of Reasons

Background

1. The complainant engaged the respondent lawyer to act for him in a family law matter against his wife. The terms were disclosed on a form purported to be a Cost Disclosure and Agreement document (“the disclosure document”) which appears to have been signed digitally by the complainant on 30 July 2015.
2. The disclosure document estimates “4 days of work at \$4,000 ex GST per day = \$16,000 ex GST (\$17,600 inc. GST)”
3. The work was to include;
 - a. “Our professional facilitation and negotiation of time”
 - b. “Project Management of confidential/without prejudice communications between parties”
 - c. “A written settlement agreement between the parties”
 - d. “A (sic) initial review, summary and schedule preparation of the asset list, including the US trust Disbursements may (at your mutual agreement) take the

form of separate tax advice re settlement terms and any referral to a professional marriage counselor (sic).”

4. The disclosure document required the payment of “AUD \$17,600” into trust prior to the commencement of any work.
5. The disclosure document incorrectly cites sections of the *Legal Profession Act 2004* (“LPA 2004”) as applying however this Act ceased to apply from 1 July 2015.
6. The disclosure statement does not provide notification of client’s rights either under the LPA 2004 or under 174(2) of the Uniform Law, which applied at the time of agreement.
7. On the same day as the complainant digitally signed the cost disclosure/agreement document, [REDACTED] issued invoice no.00001306 dated 30 July 2015 for the amount of \$17,600.00.
8. The complainant lodged a formal complaint with the VLSC’s office on 8 October 2015 complaining;
 - a. of overcharging,
 - b. of receiving an invoice for work done before actual work had commenced,
 - c. of being billed for work completed on his father’s separate legal matter,
 - d. that after requesting an “itemised invoice” he was only provided with a “timesheet”.
9. The respondent lawyer’s response in relation to the above was;
 - a. the matter was at a fixed fee rate and the figure of \$17,600 was agreed and settled on with the complainant,
 - b. the complainant requested the bill for \$17,600 to issue at the time of initial engagement, despite work not being completed at that stage,
 - c. it had been agreed with the complainant and his father, [REDACTED], that all invoices for all matters were to be handled and paid by the complainant.
10. The VLSC’s office, over a period of time, attempted to informally resolve the dispute, however the respondent lawyer was of the view he had acted and billed appropriately in the circumstances and saw no reason to compromise his bill. The respondent lawyer on two occasions requested an opportunity to have face to face mediation with the complainant however the complainant declined on both occasions as he saw no value in such a meeting.

Issue in dispute and under investigation

- Whether the respondent lawyer’s bill is fair and reasonable in the circumstances.
- Whether the respondent lawyer’s conduct amounts to a disciplinary breach.

INVESTIGATION

11. In order to ascertain if the fee charged was appropriate, the VLSC’s office engaged the services of [REDACTED], a cost lawyer to assist in this regard.

12. [REDACTED] provided a report to the VLSC's office stating he reviewed the file provided by the respondent lawyer and was of the view that only \$2,200.00 inclusive of GST was properly billable.
13. [REDACTED] also made the following observations;
 - I. That the file was in a very poor state, being a collection of loose documents with a number of attendances charged for where no file note existed.
 - II. The disclosure document quoted law from an earlier enactment and not from the appropriate Uniform Law which commenced on 1 July 2015.
 - III. There was no evidence, contrary to the respondent lawyer's assertion, that the complainant requested an invoice to issue on the same day as the retainer.
 - IV. It was not appropriate to invoice for work not completed and even if such a request was made by the complainant, such a request should have been refused.
 - V. The file disclosed work done on the complainant's father's file and billed for against the complainant. There was no evidence on the file this had been authorised or approved by the complainant.
 - VI. That even using the hourly rate disclosed on the disclosure document as a basis for calculating the fees, he was unable to arrive at a figure close to the billed figure of \$17,600.
14. After being advised of [REDACTED] calculation of fair and reasonable costs, the respondent lawyer provided additional file notes to support his billing.
15. Although this was unfortunate [REDACTED] reviewed his costings in light of the additional information and formed the view that the file costs were now \$3,784.00 inclusive of GST.
16. [REDACTED] and [REDACTED] of the VLSC's office met with the respondent lawyer on 20 July 2016 to discuss the costs review findings. [REDACTED] explained how he approached the review and the evidence he relied on. He explained that in his experience, as a result of the deficiency in the disclosure document, the Costs Court would most likely disregard the document and costs would only be allowed on scale.

Findings on issues in dispute

17. This matter has been on foot for 12 months. The respondent lawyer has been provided a reasonable amount of time to provide evidence to support his bill and to refute [REDACTED] [REDACTED] review of the legal costs charged.
18. The respondent lawyer has provided little justification for charging the fees as per invoice 00001306 dated 30 July 2015. His key argument appears to be that the contract was a fixed fee matter. The fee being fixed at \$17,600 as per the disclosure document. However, to a degree that is contradicted by the quotation on the disclosure document "...estimate 4 days of work at \$4,000 ex GST per day...". Accordingly the fee appears to be made on the basis of an estimate, not a fixed fee. An estimate implies the bill may be higher or lower as the circumstances may dictate. In any event, on the basis of [REDACTED]

■■■■■ review, it would appear the invoice *prima facie* is not fair or reasonable based on the actual work performed.

19. The disclosure document is non-compliant with the Uniform Law which commenced on 1 July 2015 rendering it void.
20. I accept the findings of ■■■■■ (based on his knowledge and experience) in relation to what the Costs Court would determine as fair and reasonable. I accept ■■■■■ has arrived at a figure of \$3,784.00 on the Family Court scale and in the given circumstances I accept it is the appropriate method of costing.
21. In forming the view that the legal costs charged were not fair and reasonable in all the circumstances, I have also had regard to the criteria set out in section 172 of the Uniform Law. I note;
 - The file was not essentially novel or difficult, and it seems the matter was really one of attempting a negotiated settlement.
 - The file does not disclose any evidence that the matter required or was given any high level attention or specialist legal skill to warrant a bill of \$17,600.00.
 - Some of the file was incorrectly attributed to matters related to the complainant's father, who was a separate client. Accordingly those activities should not have been included in the \$17,600.00 calculation. Whilst the respondent lawyer has stated there was an agreement to do so, there was no evidence of the complainant agreeing to this. It is incumbent on the lawyer to have the proper documentation authorising the application of time spent on one client, to be applied to another client.
 - The file is made up of file notes of conversations and some basic letter writing. Costing on scale would appear fair and reasonable in these circumstances.

Disciplinary aspect of complaint

22. I have also find that the conduct of failing to provide proper cost disclosure as required by the Uniform Law, issuing a bill prior to the work disclosed on the bill being completed and the level of the fee charged being unreasonable in the circumstances, amounts to a disciplinary matter under the Uniform Law.
23. On 13 October 2016 the respondent lawyer was offered an opportunity to comment on the disciplinary aspect of a finding of unsatisfactory professional conduct and by response dated 20 October 2016 declined to add anything further to previous correspondence.

Determinations & Reasons

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

Further, in making a determination as to costs, I have determined that the amount is fair and reasonable in all the circumstances having regard to section 200 of the Uniform Law and the above mentioned matters. I have also considered the principles in section 172.

Further, in making the compensation order, I am satisfied that the following prerequisites have been met—

- (a) the aggrieved person, [REDACTED], has suffered loss because of the conduct concerned; and
- (b) it is in the interests of justice that the order be made.

The amount of the order has been determined having regard to the review of the legal costs charged as performed by [REDACTED].

Appeal or Review

A respondent lawyer may seek an appeal or review in accordance with s.314(1)(a) of the Uniform Law pursuant to jurisdictional legislation, of a determination made under s290 in relation to a compensation order for more than \$10,000. Division 3 of the *Victorian Civil and Administrative Tribunal Act 1998* allows a review by the VCAT.

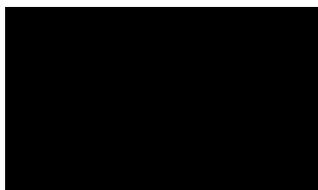
A respondent lawyer may seek an appeal or review in accordance with s.314(1)(b) of the Uniform Law pursuant to jurisdictional legislation, of a determination made under s299 in relation to a disciplinary finding. Division 3 of the *Victorian Civil and Administrative Tribunal Act 1998* allows a review by the VCAT.

Non-compliance

Please be aware that a failure to comply with a determination in a consumer matter may amount to conduct capable of constituting unsatisfactory professional conduct or professional misconduct.

Enforcement

A copy of this compensation order may be filed in the Magistrates' Court 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 (s310).



Russell Daily
Executive Director, Complaints & Intervention
Delegate of the Victorian Legal Services Commissioner
31 October 2016