

Guidance note for members

Ethical duties when instructions received from debt collection or mercantile agents

1. Introduction

1.1. Who should read this guidance note?

This guidance note is for solicitors and law practices that receive instructions from debt collection or mercantile agents.

1.2. What is the issue?

The [Legal Profession \(Solicitors\) Rule 2007](#) (Solicitors Rule) (repealed 1 June 2012) had a specific provision – Rule 29 – dealing with a solicitor’s duties in these circumstances:

29 Debt collection or mercantile agencies

- 29.1 A solicitor must not allow the solicitor’s business name or stationery to be used by a debt collection, or mercantile, agent in a manner that is likely to mislead the public.
- 29.2 A solicitor who receives, from a debt collection or mercantile agent, instructions to act for a client creditor, must ensure that:
- 29.2.1 the solicitor’s relationship to the agent is fully disclosed to the client;
 - 29.2.2 the information required to be disclosed to the client by any relevant legislation and these Rules is communicated to the client;
 - 29.2.3 the solicitor maintains direct control and supervision of any proceedings and any correspondence or communication with the client and the client’s debtor to which correspondence or communication the solicitor is or purports to be a party on behalf of the client; and
 - 29.2.4 that any money recovered on behalf of the client is accounted for by the solicitor.

The [Australian Solicitors Conduct Rules 2012](#) (ASCR), effective in Queensland from 1 June 2012, have replaced the Solicitors Rule. The ASCR do not contain any provisions that are directly equivalent to Solicitors Rule 29. However, several ASCR provisions are relevant to this issue - see details below.

This guidance note looks at the position in Queensland after 1 June 2012 in light of the lack of a specific provision.

1.3. Status of this guidance note

This guidance note is issued by the Queensland Law Society (QLS) Ethics Centre for the use and benefit of solicitors.

This guidance note does not have any legislative or statutory effect. By having regard to the content of the note and following the guidance it may be easier for you to account for your actions if a complaint is later made to the Legal Services Commission.

This guidance note is not legal advice, nor will it necessarily provide a defence to complaints of unsatisfactory professional conduct or professional misconduct.

This guidance note represents a standard of good practice and is endorsed by the Ethics Committee of the QLS.

2. Ethical principles

The lack of a specific provision for such agents in the new rules does not mean a relaxation of a solicitor's duties after 1 June 2012. The same fundamental common law principles underpinning the old Solicitors Rule 29 will continue to apply under the new rules – as detailed below.

Solicitors Rule 29.1

Clearly solicitors should not mislead the public (or anyone). Rule 4 of the ASCR provides that it is a fundamental ethical duty of a solicitor to be honest in all dealings in the course of legal practice, and to avoid any compromise to their integrity or professional independence.

“The public” in this context can clearly include debtors of the client creditor. The debtors should not be left in any doubt about who they are dealing with in the process, that is whether they are dealing with the agent or the solicitor.

In relation to this subrule and subrule 29.2.3, a solicitor or law practice must not lend their name (or their stationery) to court proceedings or other debt recovery action, where the solicitor's role in the matter is largely or wholly nominal, whether for the purpose of enabling a debt collection or mercantile agent or other similar entity to charge fees or claim legal costs or otherwise. Concern has also been expressed in Victoria that this practice has been adopted by some debt collectors to “strong-arm” debtors - see page 6 of the [Summary of the 2009 Debt Collection Round Table convened by the Legal Services Commissioner of Victoria](#).

Solicitors Rule 29.2.1

Clearly solicitors must disclose to their clients all matters relevant to the retainer including any relationships with third parties that relate to the retainer. This will include the relationship with the agent.

Solicitors Rule 29.2.2

“Information required to be disclosed to the client by any relevant legislation” will include the costs disclosure obligations in the [Legal Profession Act 2007 \(Qld\)](#) Part 3.4, Division 3. If there is any doubt about who the client is in this context there are several cases from Victoria which make clear a solicitor's duty to communicate directly with the client and advise about costs issues. These cases make it clear that this person is the person who is owed the money, the plaintiff in the proceedings. This will be the “client creditor” in Rule 29, and the person on whose behalf the solicitor acts according to the court record. These cases are discussed further below.

Solicitors Rule 29.2.3

As the solicitor on the record as acting for that party the solicitor will have a personal duty, as an officer of the court, to maintain “care and conduct” of the matter. Other lawyers within the same law practice may assume this duty or there may be limited delegation of aspects of the case to other lawyers outside the law practice, such as town agents and counsel, but this duty to conduct and supervise the matter cannot be delegated to non-lawyers outside of the law practice such as the debt collection or mercantile agents through whom the matter has come to the solicitor.

The same clearly applies, as a matter of fundamental duty to the client, in relation to correspondence with the client or the client’s debtor, whether or not the matter involves court proceedings.

As for obligations to the debtors, see the comments above in relation to Rule 29.1.

Solicitors Rule 29.2.4

Finally, it is also clear that a solicitor will continue to be bound by the relevant common law fiduciary duty to account to the client and by the detailed trust accounting provisions in the [Legal Profession Act 2007 \(Qld\)](#) and [Legal Profession Regulation 2007 \(Qld\)](#). (There is no change to the *Legal Profession Act* and *Regulation* consequent on the commencement of the ASCR).

In relation to Solicitors Rule 29.2 generally, Rules 7 and 8 of the ASCR provide that:

7. Communication of Advice

- 7.1 A solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.
- 7.2 A solicitor must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client’s best interests in relation to the litigation.

8. Client Instructions

- 8.1 A solicitor must follow a client’s lawful, proper and competent instructions.

These were amongst the issues considered in the following Victorian tribunal decisions referred to above in relation to Rule 29.2.2:

- [Legal Services Commissioner v Brott](#) [2011] VCAT 110
- [Victorian Lawyers RPA Limited v Hession](#) [2000] VLPT 12
- [Legal Ombudsman v Battley](#) [1999] VLPT 6.

These are all disciplinary cases against solicitors and have some common features. They all involved court proceedings for motor vehicle damage claims where the solicitor received instructions from a recovery company acting on the basis of an authority signed by the car driver/owner in favour of that company. The solicitor in each case commenced the proceedings on instructions from the company, purporting to act for the driver/owner but without having spoken to the driver/owner or provided them with any advice.

In each case the tribunal found against the solicitor and penalties were imposed.

Typical of the issues is Charge 3 from the most recent case *Brott*:

“...purporting to act as the legal practitioner for (the driver/owner) and commencing legal proceedings in his name without:

- a. Speaking to him;
- b. Writing to him;
- c. Clarifying with him precisely what, if any, his instructions were;
- d. Permitting him to obtain alternative legal advice or engage his choice of lawyer;
- e. Obtaining full instructions from him regarding the damage to the motor vehicle or his insurance cover;
- f. Advising him what damages he could recover;
- g. Advising him in any way about the nature of the litigation process, the likely cost of it and the likely period of time it would take;
- h. Advising him in any way of the consequences to him of embarking upon litigation, especially as to his existing rights and his obligations to his insurer;
- i. Advising him of his possible liability for costs and the risk that he could be found liable to pay costs to other parties.”

In the *Hession* case the solicitor was specifically found guilty of failure to comply with costs disclosure requirements (charges 4 and 5).

Institution of court or tribunal proceedings is not something that falls within a solicitor’s general implied authority (G.E. Dal Pont *Lawyers’ Professional Responsibility* (2010) p.55 and *Hawkins Hill Gold Mining Co v Briscoe* (1887) 8 LR (NSW) (Eq) 123 at 129-130 per Stephen J). Accordingly, a specific written authority should be obtained.

A solicitor who commences proceedings and purports to act for a party without proper authority may be liable to a personal costs order – see [Doulman v ACT Electronic Solutions Pty Limited & Anor \[2011\] FMCA 232](#) and the QLS Ethics Centre news article about this case: “[Check if you have authority to act or it may be you paying the costs](#)”.

In these circumstances there may also be a breach of ASCR Rule 19.1: “A solicitor must not deceive or knowingly or recklessly mislead the court” and Rule 22.1: “A solicitor must not knowingly make a false statement to an opponent in relation to the case...”

“Commercial agents” in Queensland are regulated by the [Property Agents and Motor Dealers Act 2000](#), Chapter 10, Part 1.

3. More information

For further assistance please contact an ethics solicitor in the QLS Ethics Centre on 07 3842 5843 or ethics@qls.com.au.