

# Letters of demand: Traps for lawyers

This fact sheet covers the issues common to complaints about lawyers involved in debt collection and provides guidance on avoiding common errors.

## INFORMATION FOR LAWYERS

Debt collection is one of the more frequently complained about areas of law in Victoria.

The Victorian Legal Services Commissioner has prepared the following information to highlight the common complaints involving letters of demand sent by debt collection lawyers.

### Rules and obligations

Lawyers working in debt collection, either directly or in association with mercantile agents, should make themselves familiar with the applicable rules and obligations in this area of law. These include:

- the Legal Profession Uniform Law
- the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (the Conduct Rules)
- the *Legal Profession Uniform Legal Practice (Solicitors) Rules 2015* (the Practice Rules)
- the Australian Securities and Investments Commission's *Debt Collection Guidelines: for collectors and creditors*<sup>1</sup>, and
- relevant case law.

### Clear correspondence

All communication with debtors should be clear and should not include misleading or intimidating statements. Rule 34 of the Conduct Rules prescribes that a lawyer must not in any communication:

- mislead or intimidate another person

- make any statement which grossly exceeds the legitimate assertion of their clients' rights
- threaten criminal or disciplinary proceedings in default of satisfying a civil liability
- use tactics which exceed legitimate advocacy and are intended to embarrass or frustrate others, or
- assert that an unrepresented person should act in a way that may affect their legal rights without suggesting they seek independent advice first.

Due care should be taken when drafting correspondence to debtors. Check that appropriate language has been used and the tone is appropriate.

It is well established that conduct is considered 'likely to mislead' if it is capable of inducing error. This is an objective test where the intention of the writer is not relevant.

It is misleading to imply in letters that certain events or consequences are certain to occur. Use words such as 'will' and 'must' with care, and where appropriate use words such as 'may' and 'potentially' instead.

It can also be misleading to imply that an event can occur at the sole discretion of the firm when this may not be the case. For example, law firms cannot order a default judgement, therefore letters should not suggest that this is the case.

For more guidance on this issue see *Legal Services Commissioner v Sampson*<sup>2</sup> and *Australian Competition and Consumer Commission v Sampson*<sup>3</sup>.

<sup>1</sup> ASIC Regulatory Guide 96 - [Debt Collection Guidelines: for collectors and creditors](#)

<sup>2</sup> [Legal Services Commissioner v Sampson \(Legal Practice\) \[2013\] VCAT 1439 \(16 August 2013\)](#)

<sup>3</sup> [Australian Competition and Consumer Commission v Sampson \[2011\] FCA 1165 \(17 October 2011\)](#)

### Legal costs in letters of demand

The *Sampson* case also provides guidance on what is acceptable when writing a letter of demand. It says if a contractual right does not exist between the creditor and debtor, the letter must not include a demand or request for payment of legal costs in addition to the outstanding debt.

An improper demand of this kind may amount to a breach of Rule 34 of the Conduct Rules.

### Use of stationery and maintaining direct control

Rule 7.1 of the Practice Rules prescribes that a lawyer must not allow their business name or stationery to be used in a manner that is likely to mislead.

Rule 7.2 also prescribes that a lawyer who receives instructions from a debt collection or mercantile agent to act for a client creditor must:

- ensure their relationship to the agent is fully disclosed in writing to the client
- disclose any relevant legislation and rules to the client, and
- maintain direct control and supervision over any proceedings and any communication with the client and the client's debtor.

These Rules prohibit a mercantile agent or its employees accessing the law firm letterhead or its computer system. Only law firm employees should draft letters on the firm letterhead. This helps the firm to maintain the level of control and knowledge over outgoing and incoming correspondence, as well as the actual initiation of court proceedings.

The decision in *Legal Services Commissioner v Nomikos*<sup>4</sup> highlights the importance of complying with the rules relating to stationery and maintaining direct control.

### Supervision

Section 10(1) of the Uniform Law prescribes that an entity (which includes an individual person) must not engage in legal practice unless they are qualified. For an individual, this means they must be qualified as an 'Australian legal practitioner'.

An employee of a mercantile agent, who is not qualified as an Australian legal practitioner, must be supervised by an appropriately qualified legal practitioner while undertaking any legal work. Failure to do this means that the individual may be engaging in unqualified legal practice and thereby committing an offence.

It is therefore imperative that adequate legal supervision be given to paralegals, clerks and all employees working on legal activities arising out of debt collection matters.

### Ensuring debts are actually due

The Australian Securities and Investments Commission's *Debt Collection Guidelines: for collectors and creditors* state that a debtor 'must not be pursued for a debt unless there are reasonable grounds for asserting the person is liable for the debt'.<sup>5</sup>

Collectors should not rely solely on client instructions without making any additional inquiries or requiring proof that there is liability, such as the existence of a contract, terms and conditions, and invoices. Naturally, the same applies to lawyers acting for debt collection agencies.

### Internal computer systems

Maintaining a good record management system will help firms remain aware of the status of a particular matter and will help prevent the initiation of unnecessary legal proceedings.

Debt files should be cross-referenced to ensure that no improper correspondence is sent to a debtor, particularly for deceased persons who may have more than one open file. Firms should have a system in place that allows names to be searched on other debt collection files or litigation files in that person's name.

### Take proper instructions

Lawyers have an obligation to seek proper instructions before acting on behalf of a creditor.

In a modern business environment, lawyers may receive instructions online from mercantile agents, upload details and generate letters without having any direct contact or consultation with the client. Dealing exclusively with a mercantile agent may conceivably result in situations where clients are not even aware that their matter has been referred to a lawyer.

Lawyers should seek formal authorisation directly from clients before initiating legal proceedings.

### Further information

Contact the Victorian Legal Services Commissioner

Tel: 1300 796 344

<sup>4</sup> [Legal Services Commissioner v Nomikos \[2013\] VCAT 1682 \(12 March 2014\)](#)

<sup>5</sup> ASIC Regulatory Guide 96 - [Debt Collection Guidelines: for collectors and creditors](#), page 27, 13(d)