

Acting in motor vehicle accident claims

This fact sheet covers the importance of obtaining proper instructions when acting for clients.

INFORMATION FOR LAWYERS

The Victorian Legal Services Commissioner regularly receives complaints about lawyers who act in motor vehicle accident matters.

Complainants often allege that lawyers have unexpectedly undertaken legal work on their behalf after they had signed an 'Instructions to Act' form (or equivalent document) at a crash repairer's workshop. The complainants had evidently not understood, nor received an explanation of the effect of the documents they had signed.

Another common allegation involves lawyers issuing or attempting to issue proceedings on a complainant's behalf, when the complainant had not instructed the lawyer to do so.

Of particular concern is that in many of these instances the lawyer had never met the client.

Who is your client?

Lawyers must remember that your client in motor vehicle repair claims is the driver or owner of the vehicle, not the crash repairer.

If you accept instructions without having met your client, you may fall short of your obligations to properly advise your client on their rights, risks and obligations, especially when litigating.

Lawyers must be careful not to imply that they have liaised with or received instructions from their clients when there has been no contact with the client directly.¹

¹ See [Victorian Legal Services Commissioner v Logan \(Legal Practice\) \[2017\] VCAT 189 \(21 February 2017\)](#) at [4] and [62] – [63].

It is insufficient to rely on a signed form as a standing authority to act where informed consent has not been obtained from the client. Further, in the absence of legal advice given to the client, it is improper to rely on a signed form to commence negotiations regarding quantum or liability.

Client awareness

Clients generally do not anticipate that by signing documents given to them by their crash repairer they are appointing a lawyer to act for them.

Without an explanation of what an 'Instructions to Act', an 'Overarching Obligations Certification' or similar type of document means, or the opportunity to ask questions about them, clients cannot be expected to understand the nature of such documents, regardless of whether lawyers believe the wording of the documents are clear.

The setting in which documents are provided may also mislead the client as to the document's purpose: a repairer's workshop is a very different environment to a law firm's office.

Assignment of legal rights

The Commissioner has reviewed 'Instructions to Act' forms from several law firms involved in crash repair and hire car recovery claims. Often the forms purport to assign all legal rights to the crash repairer or the lawyer themselves, and include initiating proceedings, negotiating settlements and signing deeds of release.

A client should be given an explanation or advice prior to signing such a form and assigning their rights.

Your obligations to clients

Clients must be provided with appropriate advice about the legal meaning and effect of signing documents. Failure to do so is a breach of your obligations to your clients².

As a lawyer you are obliged to confirm your client's instructions with them directly, before taking action on their behalf.

It is not enough to say that clients are always welcome to ask questions when they are unsure about matters. If a client does not understand they have engaged lawyers, they will not know they may have a need to raise queries.

You must explain to your client the benefits and risks of any proposed litigation, and explain their rights and obligations in relation to their accident and/or claim (including those that may arise under insurance).

You must also ensure appropriate costs disclosure is provided to your client and/or the third-party payer.³

As with all legal matters, you should keep good file notes and maintain copies of letters of advice and all other communications with your clients. Should a client make a complaint about your work, these documents will assist the Commissioner to resolve the complaint quickly.

Relevant cases

There are numerous examples in case law where lawyers have failed to meet their professional obligations when handling motor vehicle claims (see below).

In each case, the solicitor was found guilty on multiple misconduct charges for issuing proceedings on behalf of one or more clients without first seeking instructions, or providing advice about the risks of those proceedings and the clients' obligations.

These cases emphasise the importance of the following:

- Confirming your appointment and the scope of the retainer;
- Communicating effectively with your client and obtaining full and complete instructions (including the circumstances of the accident);
- Providing advice about the litigation process including likely costs and relevant time periods;

² See generally Rules 4.1.1; 4.1.2; 4.1.3; 5.1; 7; and 8.1 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*, and Sections 296, 297 and 298 of the *Legal Profession Uniform Law Application Act 2014*. See also Rules 1.1; 30.1 and 39.1 of the *Professional Conduct and Practice Rules 2005*, and Sections 4.4.2 and 4.4.3(1)(a) of the *Legal Profession Act 2004*.

³ See section 174, of the *Legal Profession Uniform Law Application Act 2014* and Part 3.4 of *Legal Profession Act 2004*.

- Advising the client of their possible liability for costs and the risk of being found liable to pay the other parties' costs; and
- Advising on the consequences of embarking upon litigation, especially the clients' existing rights and obligations to their insurer.

Demands for legal costs prior to proceedings being issued

Issues also arise when lawyers seek legal costs in letters of demand before proceedings are issued.

Letters of demand should contain clear and accurate information about any amount owing. They should not contain threats for the issuing of legal proceedings for unpaid legal costs, where those costs may not be legally enforceable. For further information see the fact sheet [Letters of Demand: traps for lawyers](#).

The decision of [Legal Services Commissioner v Sampson](#)⁴ provides that if legal costs are demanded in the absence of a contractual (or other) legal right, the conduct may amount to a breach of the [Professional Conduct and Practice Rules 2005](#)⁵. The Commissioner is also of the view that conduct of this sort may amount to a breach of the [Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015](#)⁶. Such a demand may also be a breach of the [Law Institute of Victoria's Letters of demand Guidelines](#), which could amount to a disciplinary offence.

Recommendation

If you rely on instructions from a signed form where no legal advice has been provided to the client, you run the risk of being the subject of disciplinary proceedings.

The Commissioner strongly recommends that 'Instructions to act' forms should be amended to remove any reference to an authority to act. A simple note of consent for the potential client's details to be passed on to the law firm could instead be added.

Further information

Contact the Victorian Legal Services Commissioner

Tel: 1300 796 344

Email: admin@lsbc.vic.gov.au

⁴ [Legal Services Commissioner v Sampson \(Legal Practice\) \[2013\] VCAT 1177](#)

⁵ See Rule 28.2

⁶ See Rule 34.1.1

List of relevant cases

The following cases are examples of disciplinary matters initiated where lawyers have failed to meet their professional obligations when handling motor vehicle claims:

- [Victorian Legal Services Commissioner v Logan \(Review and Regulation\) \[2017\] VCAT 1330 \(18 August 2017\)](#)
- [Victorian Legal Services Commissioner v Logan \(Legal Practice\) \[2017\] VCAT 189 \(21 February 2017\)](#)
- [Victorian Legal Services Commissioner v Logan \(Legal Practice\) \[2016\] VCAT 544 \(8 April 2016\)](#) (Decision), and [Victorian Legal Services Commissioner v Logan \(Legal Practice\) \[2016\] VCAT 1193 \(18 July 2016\)](#) (Penalty)
- [Victorian Legal Services Commissioner v Anderson \(Legal Practice \[2015\] VCAT 1157 \(31 July 2015\)](#)
- [Legal Services Commissioner v Brott \(Legal Practice\) \[2011\] VCAT 110 \(7 February 2011\)](#)
- [Victorian Lawyer's RPA Limited v Hession \[2000\] VLPT 12 \(1 August 2000\)](#)
- [Legal Ombudsman v Battley \[1999\] VLPT 6 \(2 September 1999\)](#)

Note: Although the landscape of litigation has changed due to the requirements of the [Civil Procedure Act 2010](#), the issues raised in the cases from before 2010 remain relevant.