



THE
LAW SOCIETY
OF HONG KONG
香港律師會

3/F WING ON HOUSE, 71 DES VOEUX ROAD
CENTRAL, HONG KONG DX-009100 CENTRAL 1
香港中環德輔道中71號
永安集團大廈3字樓

TELEPHONE (電話) : (852) 2846 0500
FACSIMILE (傳真) : (852) 2845 0387
E-MAIL (電子郵件) : sg@hklawsoc.org.hk
HOMEPAGE (網頁) : <http://www.hklawsoc.org.hk>

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Solicitors

CIRCULAR 05-261 (SG)

17 May 2005

RECOVERY AGENTS

The Law Society has been concerned about the activities of recovery agents, who are unqualified persons offering themselves to assist accident victims in their claims for compensation.

Features of Recovery Agency Contracts

The contracts entered into between the recovery agents and the accident victims ("recovery agency contracts") usually provide that:

1. the recovery agent will finance the claim by paying legal fees and other disbursements;
2. the accident victim has to pay over a share of his compensation to the recovery agent;
3. the accident victim has to appoint a lawyer of the recovery agent's choice;
4. either the accident victim gives full authority to the recovery agent to accept any settlement or if the accident victim refuses to accept a settlement offer, the recovery agent can withdraw his assistance;
5. the accident victim has to authorize his lawyer to pay over the recovery agent's share to the recovery agent directly;
6. the accident victim cannot terminate the recovery agency contract until the claim is completed.

The Law Society also notes that such recovery agents are not professionally qualified or subject to any code of professional conduct; there is no compulsory insurance covering any claims directed at them and they are of unknown financial backing. Moreover, the majority of accident victims probably qualify for Legal Aid, which renders it unnecessary for a third party to finance their claims. Since accident compensation in Hong Kong is assessed on the basis of actual loss, the victims will not be adequately compensated if part of their compensation has to be paid over to recovery agents. The more seriously injured victims may not have sufficient means to maintain their livelihood.

Advice from Senior Counsel on Legality of Recovery Agency Contracts

The Law Society has sought advice from Senior Counsel on the legality of a number of recovery agency contracts and is advised that:

1. The contracts are champertous and are unenforceable.
2. Maintenance (of which champerty is a more serious form) remains a criminal offence in Hong Kong and the recovery agents are liable to be prosecuted.

Misconduct of Solicitors acting in claims financed by Recovery Agents

In light of the features of the recovery agency contracts and on the basis of Senior Counsel's advice, the Law Society is of the view that any solicitor who is aware that an accident victim's claim is financed by a recovery agent under a recovery agency contract should properly advise the accident victim on his legal position, and, where appropriate, advise him to apply for Legal Aid. If a solicitor acts for an accident victim in a legal action financed by a recovery agent, he will have committed professional misconduct in the following respects:

1. The solicitor will be in breach of Rule 2 of the Solicitors' Practice Rules, in particular paragraphs (a), (b), (c) and (d),
2. The solicitor will be in breach of Principle 4.01 of the Hong Kong Solicitors' Guide to Professional Conduct, vol. 1, second edition (the "Guide"),

As a corollary to this Principle, the Law Society is unlikely to accept any suggestion by a solicitor that he does not know his client's claim is to be financed by a recovery agent as he has every practical and ethical reason to discuss financing of the claim with his client. The misconduct is aggravated if the solicitor subsequently seeks to claim costs from the Defendant knowing that in fact his client has no liability to pay him.

3. The triangular relationship between the recovery agent, the accident victim and the solicitor will put the solicitor in an inextricable position of conflict, as there is a strong incentive for the solicitor to maintain his relationship with the recovery agent who may be a constant source of business and compromise his duties to the accident victim when differences arise between the recovery agent and the accident victim. This will render the solicitor in breach of the fiduciary duty of openness and fairness owed to the client and which forms the Governing Principle in Chapter 7 and Principle 7.01 of the Guide
4. If a solicitor acting for an accident victim financed by a recovery agent subsequently claims costs from the Defendant, knowing that the accident victim does not have any liability to pay him the solicitor may be faced with serious disciplinary sanction including possible suspension from practice or even having his name struck off the Roll of solicitors.

5. If a solicitor passes on part of the accident victim's compensation to the recovery agent, then, apart from committing professional misconduct, he renders himself liable to a civil claim by the accident victim.
6. Further, depending on the exact arrangement between the solicitor and the recovery agent, the solicitor may be guilty of the offence of aiding and abetting the offence of champerty. He may also render himself in breach of section 49(1) of the Legal Practitioners Ordinance.

Liability of Employed Solicitors

The Law Society further wishes to point out that the above acts of misconduct can be committed by the principals of a firm as well as their employed solicitors. In conducting legal action for an accident victim, an employed solicitor owes the same duties to the accident victim as does his principal. Any principals who instruct or cause their employed solicitors to commit professional misconduct are likely to be liable for an even heavier penalty.

It should also be pointed out that legal executives and clerks are under the same disciplinary regime as solicitors pursuant to section 2(2) of the Legal Practitioners Ordinance.

Duty to Report Misconduct

The Law Society will have no hesitation in instituting disciplinary proceedings against any solicitor who commits the type of misconduct referred to above. Any solicitor who is aware of any such misconduct is under a duty to report the same to the Council as required under Principle 11.03 of the Guide.