

Circular

Circular No. 08-04 (CR)

- **Practitioners must enter into a debt-collection-company appointment agreement**
- **Practitioners must monitor the performance of the debt-collection companies**

Using Debt-Collection Companies

Despite the issuance of practice circulars (Nos. 99-03 (CR) and 00-03 (CR)) in March 1999 and March 2000, the Estate Agents Authority continues to receive complaints about the use of debt-collection companies by estate agents, in regard to the use of harassment or improper tactics.

To step up control in this regard, the Authority requires practitioners to observe the following before appointing a debt-collection company: –

1. Before instructing a debt-collection company to carry out debt-collection activities on a defaulting client, a practitioner should consider seeking legal advice to ascertain that his claim for the amount due is still valid and subsisting. He must also immediately stop debt-collection activities on a defaulting client once he becomes aware that a bankruptcy order has been issued in relation to the defaulting client.
2. Before appointing a debt-collection company, a practitioner should notify the defaulting client in writing stipulating the amount owed to the practitioner and the deadline for payment, and stating that a debt-collection company will be appointed if no payment is received after the deadline. The notice should also cover the contact details of the person in the practitioner's office who is responsible for overseeing the collection of the client's debt to the practitioner, and that the client should, in the first instance, report

to the practitioner any improper debt recovery actions taken by the debt-collection company.

3. In instructing a debt-collection company, a practitioner must enter into a written agreement with the debt-collection company on terms including the following: –

(a) The debt-collection company must not resort to intimidation or violence, whether verbal or physical, against any person or appropriate or damage the defaulting client's property. The debt-collection company must not employ harassment or other improper debt-collection tactics such as: –

- putting up posters or writing on the walls of the defaulting client's residence or workplace, publicising copies of the defaulting client's identity card or taking other actions designed to humiliate the defaulting client;
- pestering the defaulting client with persistent phone calls;
- pestering the defaulting client's family members and friends for information about the defaulting client's whereabouts;
- making false or misleading representation with the intent to induce the defaulting client to make a payment;
- making telephone calls to the defaulting client at unreasonable hours;
- using false names to communicate with the defaulting client;
- making anonymous calls and sending unidentifiable notes containing threatening words or graphics to the defaulting client or to the defaulting client's workplace or neighbours; and

- making abusive or threatening remarks to the defaulting client.
- (b) The debt-collection company must not try to recover the debt directly or indirectly from a third party, including the defaulting client's relatives or friends.
- (c) The agreement should make it clear that the relationship between the estate agency company and the debt-collection company is one of principal and agent.
- (d) The debt-collection company must not sub-contract the collection of debts to any other third parties.
- (e) Any demand notes issued by the debt-collection company must contain the name and address of the debt-collection company, as well as those of the estate agency company.
- (f) The debt-collection company must inform the defaulting client in advance that all telephone communications with him will be recorded and the purpose of doing so. The debt-collection company must also keep records of contacts with the defaulting client. Such records should include information on the debt-collection company staff making the contact; the date, time and place of contact; and a report on the contact. Both the recording and contact records should be kept for a minimum of 60 days after the contact is made and, upon request, produced to the estate agency company for inspection; and
- (g) The debt-collection company must observe a strict duty of confidentiality in respect of client information.

(As proof of compliance with this guideline, practitioners should produce the agreement with the debt-collection company to the

Authority upon its investigation of any complaint in respect of alleged misconduct relating to debt-collection activities.)

4. Practitioners should require their debt-collection companies, when collecting debts, to identify themselves and the practitioners for whom they are acting. Practitioners should issue an authorisation document to their debt-collection companies so that it can be produced as proof of their appointment in the course of debt collection.
5. Practitioners should give clear written instructions to the debt-collection company to reflect the requirements contained in this Practice Circular. Practitioners should monitor the conduct of the debt-collection company in its performance of the agreement and act promptly on receipt of any complaint against the debt-collection company. Practitioners shall remain accountable to clients for any complaints arising out of debt collection by the debt-collection company and should not disclaim responsibility for misconduct on the part of the debt-collection company.
6. Debt-collection companies should not be given a free hand as to recovery procedures. Practitioners should establish effective procedures to monitor continuously the performance of their debt-collection companies, such as requiring the debt-collection companies to produce periodic reports on action taken.
7. Practitioners should establish procedures to handle complaints received from clients. They should carry out a careful and diligent inquiry into the complaint to check whether there is any misconduct on the part of the debt-collection company and whether there is any breach of the requirements stipulated in this Practice Circular. Practitioners should require debt-collection companies to take immediate and appropriate remedial action if so warranted.

8. Practitioners should maintain a register of complaints about improper action taken by the debt-collection companies and should respond promptly to the complainants after investigation.
9. Practitioners must not pass information about third parties other than defaulting clients to their debt-collection companies.
10. Upon the discovery of the use of any illegal means or the carrying on of any illegal conduct by the debt-collection company in collecting the debt or the breach of any contractual terms between the practitioner and the debt-collection company, practitioners should terminate the agreement. Practitioners should bring apparently illegal conduct by the debt-collection company in collecting the debt to the attention of the Police; and
11. Practitioners should establish effective communication with their debt-collection companies for prompt updates on the amount of repayment made by clients so that the companies will stop immediately all recovery actions once the debts are settled in full by the clients.

Practitioners are reminded that since the relationship between an estate agent and the debt-collection company is one of principal and agent and under the general principles of agency law, estate agents may be held liable for tortious acts committed by the debt-collection companies acting within the scope of their authority. Moreover, a creditor owes a debtor a common law duty to exercise reasonable care in the selection and appointment of a debt-collection company. Practitioners should therefore have proper procedures in place for the selection of debt-collection companies and the supervision of their conduct. These procedures should be subject to regular review and should consist of a review of the background information of the debt-collection company and an evaluation of the operation of the debt-collection company.

Debt-collection companies may sometimes commit offences while carrying out improper debt-collection activities, such as Section 24 (Intimidation), Section 25 (Assault), Section 60 (Destroying or damaging property) and Section 61 (Threats to destroy or damage property) of the Crimes Ordinance; Section 15 (Threatening to kill or murder), Section 42 (Forcible detention), Sections 17, 19, 39 and 40 (Assault) of the Offences Against the Person Ordinance; Section 4(22) (Nuisances), Section 8(b) (Offences against good order) and Section 20 (Telephone calls and messages) of the Summary Offences Ordinance; and Section 23 (Blackmail) of the Theft Ordinance. Practitioners are further reminded that if they assist, encourage or procure the debt-collection companies to commit these offences, they may be criminally liable for the same offences as a secondary party. According to Section 89 of the Criminal Procedures Ordinance, any person who aids, abets, counsels or procures the commission by another person of any offence shall be guilty of the like offence. They may also be liable for conspiracy under Section 159A of the Crimes Ordinance and other common law offences such as incitement and procuring.

Furthermore, failure to comply with the above guidelines may be seen as not having established a proper system to manage a business and may therefore amount to a breach of Section 15 of the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation (which requires the management to establish proper procedures or systems to supervise and manage its estate agency business), giving rise to disciplinary action by the Authority.

This Circular supersedes Circulars Nos. 99-03 (CR) and 00-03 (CR).

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