



## REPORT OF THE ADJUDICATOR

<b>WASPA Member</b>	Nashua Mobile
<b>Information Provider (IP)</b> (if any)	MBD Attorneys
<b>Service Type</b>	SMS
<b>Source of Complaints</b>	Public
<b>Complaint Number</b>	10759
<b>Date lodged</b>	7 October 2010
<b>Code of Conduct version</b>	9.0

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### Complaint

1. The need for this adjudication stems from a complaint lodged on 7 October 2010 by a firm of attorneys representing the complainant. The complainant had sought legal assistance in respect of alleged debts owing to a large South African retailer which had been ceded to the IP in this matter – a firm of attorneys specialising in debt recoveries and collections.
2. In its attempts to recover the alleged debt, the IP sent a number of SMS messages to the complainant seeking to remind him of the alleged debt and to prompt payment. The complainant's attorneys referred the sending of these SMSs to WASPA on the basis that they constituted breaches of chapter 5 of the WASPA Code in that they (a) constituted unsolicited commercial communications and (b) did not provide an opt-out mechanism for the recipient.
3. The complainant through his attorneys further noted that he had tried to unsubscribe telephonically and by sending STOP in return a number of times but that he had continued to receive the messages.
4. The WASPA member acted swiftly in response to the complaint and confirmed after communicating with the IP that the complainant had been removed from the relevant distribution list. As a result and after verifying that he had indeed been unsubscribed, the complainant elected to withdraw the complaint.

5. The WASPA member indicated, however, that it wished the matter to proceed to formal adjudication so that clarity could be brought to the application of the WASPA Code of Conduct to SMS messages of this nature.
6. As such the relief sought is at the instance of the WASPA member and is of a declaratory nature. This is not a scenario contemplated under the Code but the adjudicator regards any attempt to bring clarity to the application of the Code as being beneficial to the integrity of the Code and accordingly believes that the matter can be entertained. Notwithstanding the nature of the finding no sanction will be applied to the WASPA member.
7. The member raised the following arguments in support of its contention that the SMS messages did not contravene the WASPA Code:
  - “3. As a Service Provider, we request the Adjudicator to consider the application of the Code of Conduct to this complaint, as we are of the view that the nature of the sms sent on behalf of the IP are not subject to the provisions of the WASPA code of Conduct for the reasons set out below.
  4. Section 2 of the Code of Conduct (version dated 2010- 10-13) defines the following:  
2.8 A “**commercial message**” is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from the recipient.” (our underlying)  
2.23 “**Spam**” means unsolicited commercial communications, including unsolicited commercial messages as referred to in Section 5.2.1”
  5. If one has to regard to the content of the sms’s sent, on a plain language interpretation these sms messages can never be construed or interpreted as being “designed to promote the sale or demand of goods and services” and can therefore never fall within the definition of a ‘commercial message’ and hence the application could also never be construed as ‘spam’. The sms message sent was a notification to the Client and a request for payment of outstanding debts/ accounts. The IP in this instance has a right to collect a debt and cannot be prohibited from sending a sms merely because the debtor decides that it does not want to receive messages regarding his overdue account.
  6. Section 5 of the Code of Conduct deals with commercial communications, commercial messages and spam. Given that the debt collection sms message sent on behalf of the IP could never be construed as a commercial message if follows that the entire Section 5 cannot and does not apply to these sms messages being sent. Following this, the right of a consumer to ‘opt out’ does not apply to the debt collecting sms sent on behalf of the IP.
  7. In light of the above, Nashua Mobile denies that it has contravened the Sections of the Code of Conduct and request that the complaint be dismissed. We have perused and considered many previous rulings, and are of the view that the Adjudicator has erred in considering the definition of ‘commercial message’ in its rulings.”

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### Sections of the Code considered

8. The member has based its argument on version 10.0 of the Code which came into force shortly after the complaint was lodged. Given the nature of the relief sought and the fact that the relevant sections have remained largely unchanged since the inception of the Code, this is a practical approach.

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9. The relevant sections of said version 10.0 are set out in the excerpt above.
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**Decision**

10. It is useful at the outset to be clear that there are two distinct issues involved in this matter:
- 10.1. Do SMS messages sent for debt-collecting purposes as received by the complainant constitute “commercial messages” for the purposes of the Code?
- 10.2. If the answer is yes, does the specific message complained about constitute an unsolicited commercial SMS as defined in section 5.2.1 of the Code?
11. In [Complaint 350](#) the complainant alleged that spam had been received from MBD Attorneys (the IP in that matter) through WASP services provided by a different WASPA member. The member in response noted only that it had applied a filter to ensure that the complainant would not receive further mail of this nature. The adjudicator found the SMS in question to be unsolicited and the member to be in breach of section 5.3.1. The adjudicator noted in passing that the message appeared to be commercial in nature.
12. This complaint was subsequently taken [on appeal](#) but the finding that the message was commercial in nature was not raised or considered.
13. [Complaint 3026](#) was lodged in respect of the WASPA member and IP in respect of which the current complaint applies. The member responded in that matter as follows:
- 13.1. The member denied that the SMS received by the complainant constituted spam and expressed the view that debt-collecting SMS messages of this nature did not breach the WASPA Code of Conduct.
- 13.2. It had been informed by MBD Attorneys that there was a legitimate debt underpinning the sending of the SMS but was not in a position to verify this and noted that it was not clear to the member whether the complainant had consented to receiving notifications of the debt collection by SMS.
- 13.3. The member referred to the outcome of the complaint and appeal in respect of complaint #350 and stated that – given the ruling in that matter – it would, on a without prejudice basis, block the sending of further messages to the complainant. The member also confirmed that it had instructed MBD Attorneys to stop using SMS as a means of contacting the complainant and that MBD Attorneys had indicated that they would comply with this instruction and in future contact the complainant telephonically.
14. The adjudicator found in this matter that the SMS message received did not constitute spam as defined in section 5.2.1 of the Code in that “a prior commercial relationship existed between the complainant and a creditor, which has been ceded or otherwise

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been handed to the IP” and that this, in turn, created a direct relationship between the IP and the complainant. Further: “While not indicated by the SP, it is also likely that the complainant agreed to his creditor contacting him using supplied details, which agreement may be transferable to the IP”. There was therefore no breach of section 5.3.1.

15. The adjudicator, however, took the matter further, holding that the member had breached section 5.1.2 of the Code in that it not honoured requests from the complainant that it cease sending SMS collection requests. The adjudicator introduced the notion of harassment of a recipient of this type of message:

“Indeed, the IP (or the creditor if the debt has not been ceded) must at some stage make a decision whether to litigate in order to recover the alleged indebtedness, or not. It cannot sit on its hands and not take legal action while justifying its actions on the basis of an alleged indebtedness. Continuing to send SMS reminders, without actually proceeding with collection or honouring the complainant’s request to desist, amounts to harassment.”

16. The Adjudicator in complaint 3026 recognised that SMS may be a useful contact tool for debt collection, but expressed the view that it should not be used in such a manner that it constitutes harassment of the recipient.

17. In [complaint 4500](#) the complaint once again alleged receipt of an unsolicited commercial SMS message sent by MBD Attorneys through the WASP services offered by the same member as is the subject of the current complaint. The complainant in this matter specifically alleged that:

17.1. She did not consent to receiving SMSs from MBD Attorneys or from the SABC (the SMS related to an allegedly outstanding TV licence fee); and

17.2. She had been overseas for a period of time and therefore there was no commercial relationship with the SABC in the last six months, or, for that matter, with MBD Attorneys. The SMS did not provide an opt-out mechanism nor was there an identifier or originating number.

18. The WASPA member in its response advanced the view that messages of this nature are not regarded as spam under the Code and referenced the adjudication in complaint 3026 in support of this view. The member opined that this adjudication had noted that the use of SMS messages for debt-collecting purposes was acceptable to the extent that it did not constitute harassment. The member argued further that the SMS in question did not fall within the definition of the term “commercial message” as set out in the Code.

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19. The adjudicator in complaint 4500 made the following findings:
- 19.1. The SMS fell within the definition of a “commercial message”.
  - 19.2. That the existence of a prior commercial relationship as between the complainant and the SABC could be inferred from the existence of the obligation on which the SMS was based and this obligation had been subsequently ceded to MBD Attorneys in good faith. The message therefore was not unsolicited within the dictates of section 5.2.1 of the Code.
  - 19.3. Having found that the message was a “commercial message” for the purposes of the Code it followed that the balance of the provisions of the Code relating to commercial messages should be applied. An SMS of this nature should accordingly provide an opt-out mechanism as also an identifier or originating number.
20. The above line of application of the Code was further developed in [complaint 6347](#), involving a different WASPA member and a different IP. In that matter it was held that:
- 20.1. The SMS message sent for debt-collecting purposes was a commercial communication within the definition of that term in the Code.
  - 20.2. Where there is compliance with the provisions of sections 5.1, 5.2 and 5.3 then there can be no question of harassment as the recipient will have the ability to opt-out.

*Do SMS messages sent for debt-collecting purposes fall within the definition of “commercial messages”?*

21. At the outset it must be noted that the adjudications canvassed above are unanimous in answering this query in the affirmative. The member in its arguments does not seek to distinguish this matter from existing precedent but rather contends that such precedent is incorrect.
22. Is it permissible under the WASPA Code for an adjudicator – as opposed to an Appeal Panel or the WASPA Code of Conduct Committee – to deviate from precedent where no grounds appear for doing so? The Code is silent in this regard but there is a significant body of decided matters which affirm that the principle of binding precedent applies in respect of WASPA adjudications. There are no facts which distinguish this matter from any of those discussed above and it is accordingly doubtful whether an adjudicator has the necessary authorisation to adopt a conflicting interpretation of the Code or whether the matter would have to be settled either through a WASPA Appeals Panel ruling or a clarifying amendment to the Code.
23. Nevertheless, given the declaratory nature of the relief sought and the adjudicator’s decision to proceed to provide a ruling, it would be somewhat self-defeating to simply

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declare that this adjudicator cannot make a ruling at odds with those listed above. As will be seen below it is further the case that WASPA is currently reviewing these sections while preparing the next iteration of its Code of Conduct.

24. The member raises the following arguments:
- 24.1. On a plain language interpretation messages of this kind cannot be interpreted as being “designed to promote the sale or demand of goods and services”.
  - 24.2. These messages serve as a notification to the customer and a request for payment of outstanding debts/ accounts.
  - 24.3. The IP in this instance has a right to collect a debt and cannot be prohibited from sending a SMS merely because the debtor decides that it does not want to receive messages regarding his overdue account.
25. The interpretative approach to the WASPA Code of Conduct is purposive / teleological rather than literal or based on a “plain language interpretation”. This was recently confirmed in [Complaint 10549](#). Simply stated, this approach requires that adjudicators when interpreting the Code should not limit themselves to a consideration of the plain meaning of the language but should also bear in mind the purpose for the enactment of the WASPA Code. At the same time adjudicators should take care not to themselves create substantive provisions or interpretations of the Code through an overly-flexible interpretative approach.
26. This purpose of the WASPA Code of Conduct in general is succinctly captured in section 1.2 thereof:
- “1.2. Objectives of the Code of Conduct**
- The primary objective of the WASPA Code of Conduct is to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.”
27. The crisp question then is whether, under a purposive approach, the phrase “designed to promote the sale or demand of goods or services” as contained in the definition of “commercial message” is sufficiently broad to include a message sent with the intention of recovering the purchase price or service fee attaching to a good or service (such as television licence fee).

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28. This is not a simple enquiry but on a balance it appears to this adjudicator that it cannot reasonably be held that the SMS forming the subject of the complaint promoted the sale or demand of goods or services. Notwithstanding the fact that the SMS undoubtedly has a commercial character it does not appear to fall within the ambit of the definition of the term “commercial message” as it is defined in the Code.
29. It is according found that debt-collecting messages of the type seen in this matter are not commercial messages for the purposes of the WASPA Code and therefore do not fall to be regulated by those provisions of the Code applicable to commercial messages as defined.
30. In making this finding the adjudicator is departing from a long line of precedent, and this fact alone should be sufficient to establish that there is undesirable vagueness in the definition of “commercial message”.
31. The adjudicator also noted that section 5.1.2 requires “any message originator” to have a facility to allow recipients to remove themselves from the message originator's database, so as not to receive any further messages from that message originator (defined in the Code as “the entity sending a commercial message and can be any person with a commercial arrangement with a WASP to send commercial messages, or a WASP directly”). It therefore follows that section 5.1.2 applies to “commercial messages” as defined notwithstanding that there is no specific mention of the term “commercial messages in that clause”.

*The relevance of whether the sending of the SMS messages constitutes harassment*

32. The adjudicator believes that the application of a test for a breach of section 5.3.1 needs to be treated cautiously.
33. Where there is a volume of messages such that an adjudicator is able to objectively identify harassment of a recipient this may well constitute a breach of provisions relating to general conduct such as section 3.1.1 insofar as this section requires professionalism in dealing with members of the public.
34. Harassment is not, however, relevant to whether or not an SMS is an unsolicited commercial message as defined by section 5.2.1; nor is it directly relevant as to whether or not a WASPA member has taken “reasonable measures to ensure that their facilities are not used by others for this purpose” under section 5.3.1 (the invocation of which requires an antecedent finding that a message is an unsolicited commercial message), although a high volume of messages to a recipient may be a factor in making a determination in respect of compliance with this section.

35. In the circumstances the following ruling is made:
- 35.1. The SMS forming the basis for the complaint is not a “commercial message” for the purposes of the Code. It was therefore not required to comply with, *inter alia*, sections 5.1.2 and 5.2 read with 5.3 of the Code.
- 35.2. The complaint, to the extent that it persists, is dismissed.
36. The adjudicator has had sight of a draft of the next iteration of the WASPA Code of Conduct and has noted that the relevant structures within WASPA have already given consideration to the issues raised in this adjudication and that they have taken steps to amend the definition of the term “commercial message” so as to make it less restrictive. Version 10.5 also seeks to introduce a new definition for the term “direct marketing message” which corresponds to the definition of “commercial message” currently set out in version 10.0. Furthermore chapter 5 will in the main be applicable under the proposed version 10.5 only to direct marketing messages.
37. The WASPA Secretariat is requested to bring this adjudication to the attention of the relevant structures within WASPA for consideration in their finalisation of version 10.5 of the Code.
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