

Walking the line:

The balancing of duties in litigation

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Executive summary

This report discusses the differing duties owed in litigation, and examines the ways in which misconduct can arise. By bringing together examples of the challenges solicitors face when balancing these duties, we hope this report proves a useful resource for firms and individual practitioners.

Our Risk Outlook 2014 highlighted *Failure to act with integrity or ethics: improper or abusive litigation* as one of our priority risks. It is critical that solicitors manage this risk effectively if we are to ensure the legal services market operates in a way that serves the needs of consumers and the public interest.

Integrity and ethics in litigation

Although solicitors must fearlessly advance their clients' cases, they are not "hired guns" whose only duty is to their client. They also owe duties to the courts, third parties and to the public interest. Breach of those duties can give rise, for example, to wasted costs orders or to findings of misconduct.

The SRA Handbook 2011 (the "Handbook") includes the SRA Principles 2011 (the "Principles") which embody the key ethical requirements on firms and individuals who are involved in the provision of legal services.

These include the duties to act in the best interests of each client, not to allow independence to be compromised and to uphold the rule of law and the proper administration of justice. The Notes to the Principles explain that it is the public interest, especially the public interest in the proper administration of justice, that should prevail where these duties conflict.¹ It is not always straightforward to navigate this line.

Balancing duties in litigation

The following behaviours demonstrate the difficulties in balancing these duties. Whether difficulties are driven by a lack of integrity, or a failure to balance duties effectively, will always depend on the facts of each case.

Many instances involve the solicitor unduly prioritising the client's interest over their other duties:

- predatory litigation against third parties, where the solicitor, in the interest of the client, uses the threat of litigation to obtain settlement, often from several opponents, on cases that have no real merit, but where the cost of settlement is less than the financial, emotional or reputational cost of fighting the claim
- abuse of the litigation process, where a solicitor uses the courts or general litigation process for purposes that are not directly connected to resolving a specific dispute, for example by incurring unmanageable costs for a commercial rival of a client
- taking unfair advantage of a third party. For example, by exploiting another party's procedural errors or lack of legal knowledge in certain circumstances
- misleading the court, where the solicitor knowingly or recklessly gives false information to the court or permits it to be given
- excessive litigation, where the solicitor fails to consider their other duties when following a client's wish to pursue aggressive and, in particular, speculative litigation.

1. [SRA Code of Conduct 2011, Principles, Note 2.2](#), SRA, 2011

We have also seen instances where the solicitor fails to act in their client's interest:

- predatory litigation, where clients are induced to proceed with litigation where there is little or no legal merit, or where litigation is not actually required
- taking on weak or unwinnable cases, where a solicitor accepts instructions without making the potential costs and risks clear to the client.

The most harmful examples are often predatory litigation schemes, which can become widespread and affect very large numbers of individuals.

Prevalence of this risk

Most of the issues described in this report occur sporadically, though some can become widespread.

One way we can monitor the scale of this risk is by analysing the number and type of matters reported to us. Reports are often made to us by courts, clients and other parties to litigation. For example, reports of solicitors misleading the courts have broadly increased in recent years.

Maintaining the high ethical standards that the public is entitled to expect is a critical task for the regulatory system. The ongoing Training for Tomorrow work on the reform of legal education and training is aimed to ensure this. Our Competence Statement in particular captures the key activities required of a solicitor, helping to assure the maintenance of standards.²

Although this paper contains reference to the Solicitors Regulation Authority Handbook and details the required Outcomes, it is not intended to be guidance to the profession on the issues raised.

For guidance on these matters of conduct please refer to the published guidance on our website or contact the SRA Professional Ethics helpline on 0370 606 2577.

2. [Training for tomorrow: a competence statement for solicitors](#), SRA, 2015

Introduction

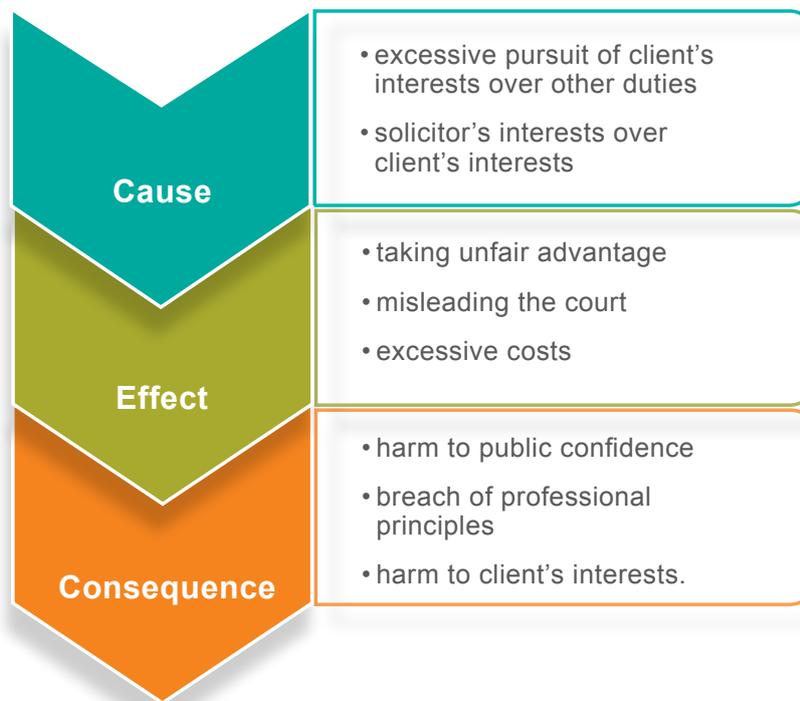
Litigation is a reserved legal activity and a highly visible aspect of legal practice. The integrity of our justice system is a reason for its status as an international forum of choice.³ Improper or abusive litigation was highlighted as a priority risk in the Risk Outlook 2014.

By showing the ways in which the risk of improper or abusive litigation tends to occur, this report discusses how individuals and firms must balance the interests of a client with their duty to the court, third parties and the wider public interest.

It has been argued that lawyers owe little or no duties beyond those to their clients and that they are “hired guns”.⁴ The legal and regulatory rules governing professional practice, however, clearly cover impropriety arising from behaviour that was in the best interests of the client.

In some cases, an excess of zeal in the pursuit of a client’s interest has led solicitors to disregard their wider duties. Clear-cut cases are relatively rare, but we have seen cases of solicitors taking unfair advantage of an opponent, misleading the court or taking actions that lead to grossly disproportionate costs. When this happens, the public confidence in the legal system that underpins the rule of law is put at risk.

Also of concern is behaviour that relates, not to the pursuit of the client’s interest, but to the pursuit of the solicitor’s interest at the expense of the client. For example, the pursuit of cases with little prospect of success, where the risks of litigation are not explained, may cause harm to clients. Again, these issues have the potential to cause serious harm to confidence in the legal system.



3. [Growth is our business: a strategy for professional and business services](#), HM Government, 2013

4. Professional Legal Ethics: Critical Interrogations, p165, Nicolson, D. and Webb, J. OUP, 1999,

Legal and regulatory background

The solicitor's duties in litigation are clearly set out in the Legal Services Act 2007 ("LSA"), which makes clear that legal obligations extend beyond those owed to the client.

The five professional principles in the LSA are as follows:

- (a) that authorised persons should act with independence and integrity
- (b) that authorised persons should maintain proper standards of work
- (c) that authorised persons should act in the best interests of their clients
- (d) that persons who exercise before any court a right of audience, or conduct litigation in relation to proceedings in any court, by virtue of being authorised persons should comply with their duty to the court to act with independence in the interests of justice
- (e) that the affairs of clients should be kept confidential.

Principles (a) and (d) emphasise the importance of the independence of lawyers, including their "duty to the court to act with independence in the interests of justice".

"Independence", in this context, clearly includes independence from the client. This has been set out clearly by the Solicitors Disciplinary Tribunal ("SDT"), as follows:

*"A solicitor is independent of his client and having regard to his wider responsibilities and the need to maintain the Profession's reputation, [they] must and should on occasion be prepared to say to [their] client 'What you seek to do may be legal but I am not prepared to help you do it'."*⁵

It is clear that solicitors must be able to take cases forward fearlessly and effectively, but there are limits. Cases must be brought honestly. Clients and sometimes solicitors have to sign statements of truth. It is improper to mislead the court or other parties. Documents that damage a client's case must be disclosed if they are relevant to the case.

If a solicitor knows that a client's case is not honestly brought, they must not act. Where suspicion arises or the context is high-risk, the solicitor's duty to the administration of justice and the public interest would demand proper verification of the instructions and evidence. Correspondence with lay opponents in particular must not be misleading or intimidating.⁶

5. In the matter of Paul Francis Simms, Solicitors Disciplinary Tribunal, 2002

6. In the matter of Brian Miller and David Gore, Solicitors Disciplinary Tribunal, 2010

These issues are reflected in the Handbook. The primary duties of the solicitor to various parties are clear, and are set out in the Principles. The Outcomes that firms and regulated individuals must achieve reflect the importance of steering the course between these Principles.

- **Principle 1** requires the solicitor to uphold the rule of law and the proper administration of justice.
- **Principle 3** requires solicitors not to allow their independence to be compromised.
- **Principle 4** sets out the obligation of the solicitor to act in the best interests of the client.
- **Principle 7** requires solicitors to act in accordance with their legal and regulatory obligations.

Outcome 1.2 of the SRA Code of Conduct 2011 (the “Code”) states, “*you provide services to your clients in a manner which protects their interests in their matter, subject to the proper administration of justice*”.⁷ This demonstrates clearly that there are limitations on the solicitor’s right to pursue their client’s case as their client may wish. Outcome 1.3 clarifies this by requiring a solicitor to comply with the law and the Code when deciding whether to act.

The Outcomes regarding duties to the court are as follows:

- **Outcome 5.1** operates to prevent the solicitor from intentionally, knowingly or recklessly deceiving the court.
- **Outcome 5.2** operates to prevent complicity in another’s deception of the court.

The implication of this is described in Indicative Behaviour 5.5: if the solicitor knows that their client is committing perjury or otherwise misleading the court, they should cease to act if the client will not agree to inform the court of the deception.

7. [SRA Code of Conduct 2011, Chapter 1](#), SRA, 2011

Types of improper or abusive litigation

Here, we set out some examples of when impropriety or abuse can arise in litigation. Many cases may be individually severe, but do not reflect anything more widespread. However, some cases are notable for being able to affect large numbers of consumers.

Although each case will be dependent upon specific circumstances and facts, we have found there are broadly two categories of improper or abusive litigation:

- where the duty to the court, third parties or to the public interest has been breached in the name of another interest, usually that of the client
- where it is the duty to the client that has been breached in the interests of another party, usually the solicitor.

We now turn to specific examples within each of these categories.

Breach of duties to others

Predatory litigation against third parties

This commonly involves the use of the threat of high legal costs, or public embarrassment, to induce opponents to settle cases that have no real merit. The payment sought may, or may not, be legally recoverable. There may be limited or no evidence that the opponent is indeed liable.

For example, a law firm may send letters of claim to large numbers of individuals alleging on limited evidence that they have breached the intellectual property of their client and seeking payment significantly lower than the potential cost of fighting the claim.

In some of these cases, there is little sign that there is an intention to bring the case to court. Although the opponents could fight the case in court, the cost of reaching that stage, and the fear of costs, often encourages settlement. There is often a large asymmetry of knowledge and legal understanding between the two parties, in favour of the solicitor's client.

There have been cases where the letter of claim included the threat to reveal publicly embarrassing information if the opponent failed to settle. Such schemes have been described in the House of Lords as "blackmail".⁸

Whether litigation has been predatory or the actions taken by a solicitor demonstrate misconduct would be determined strictly on the facts.

Abuse of the litigation process

This involves the use of litigation for reasons that are not connected to resolving genuine disputes or advancing legal rights. Purposes can include harming commercial competitors, silencing criticism or stalling another process. The aim is to use the threat of cost or delay to achieve an end unconnected to the litigation.

Unlike predatory litigation, approaches are not usually made to numerous persons and obtaining financial redress for the client is not necessarily the goal.

8. [Hansard, Lord Lucas, Column 1309](#), 2010

An example would be the pattern, noted by the administrative court, of solicitors making late, purportedly urgent applications for judicial review of deportation decisions after all appeals had been exhausted and without any merit, any new facts or any legitimate reason for either the urgency or the lateness. The court suspected these were being used as a stalling tactic to unjustifiably delay clients' deportations.⁹ The courts have emphasised that such conduct represents an abuse of process.

Which side of the line a claim falls on is determined heavily by the proportionality of the claimant's actions, and ultimately by the merits of their claim should it reach a court.

Taking unfair advantage

In advancing a client's interests, solicitors must be careful not to take unfair advantage of the opponent or other third parties such as witnesses. Special care is needed where the opponent is unrepresented. Solicitors need to consider this duty when faced with a party showing a simple lack of legal knowledge or obvious procedural misunderstandings.

As the Court of Appeal has set out, this duty does not necessarily mean that solicitors involved in litigation must ensure that their opponents do not fall into traps of their own making.¹⁰ They must, however, take care not to mislead. There can be a fine line between proper defence of the client's interest and taking unfair advantage of others, usually highlighted by any form of deceit or misinformation.

There was a case where a solicitor chose not to remind their represented opponent, a substantial business, that they had failed to serve their letter of claim prior to an agreed stay of proceedings. The hope was that they would neglect to do so when the stay was terminated and would run out of time, which they did. As in this case, the Court of Appeal has allowed such tactics between represented and sophisticated litigants.¹¹ It is clear that actively encouraging another party in a procedural misunderstanding would not be permitted.

In the Code, Indicative Behaviour 11.7 suggests that taking unfair advantage of an unrepresented party's lack of legal knowledge could suggest a failure to comply with your duty to others.

Other examples include the use by in-house solicitors of trading styles that suggest that they are an independent firm, for the purpose of debt collection work. Although trading styles themselves are not prohibited, it is important that they are not misleading. We have issued guidance on this practice.¹²

Misleading the Court

Solicitors who allow their client to mislead the court or who do so themselves risk serious consequences. The courts have made it very clear that they regard this as "one of the most serious offences that an advocate or litigator can commit".¹³

9. Hamid, R (on the application of) v Secretary of State for the Home Department [2012] EWHC 3070 (Admin), 2012

10. [The legal trap: is trickery tactical or unconscionable in litigation proceedings?](#), Legal Week, 2012

11. For instance in [Bethell Construction Ltd & Anor v Deloitte and Touche \[2011\] EWCA Civ 1321](#), 2011

12. [Warning notice: Employed solicitors: publicity and information provided to third parties](#), Solicitors Regulation Authority, 2014.

13. [LCJ uses Nightjack case to warn lawyers who mislead Court of "exemplary punishments"](#), Legal Futures, 2014.

Knowingly helping a criminal client to create a false alibi would be an obvious example, for which solicitors have in the past been struck off.¹⁴ A related situation would be where a solicitor knows that their client obtained information for use in their case by illegal means, yet assists the client in providing a false explanation of where the evidence came from.

Attempts to induce expert witnesses to alter their reports to the benefit of the solicitor's client may, depending on the circumstances, represent another example of misleading the court. A survey in 2014 revealed that nearly a third of expert witnesses had felt pressure from those who commissioned them, including barristers and solicitors, to make changes to their reports in a way that they believed harmed their impartiality.¹⁵ This headline finding should be treated with care, as some of those requests may have reflected a desire for clarification. Others, such as requests to alter doctors' notes, may represent misconduct.

Given the stakes for the defendant, criminal defence work involves perhaps the highest risk of difficulty when balancing differing duties. It is the defendant's right to require the state to prove its case.¹⁶ It is in the public interest that the state be required to do this to the requisite standard before it can make a finding against a person. Even

where a defendant has informed their solicitor that they are guilty, the client cannot be prevented from pleading not guilty and their discussions with the solicitor are covered by their duty of confidentiality and by absolute legal professional privilege.¹⁷

Solicitors must still, however, take the greatest care not to directly mislead the court or to permit their client to do so, for instance by advancing a defence that they know to be false. How to comply with the various duties in such cases will depend on the specific facts at hand. The solution in some circumstances may be to cease acting.

Reports made to us of solicitors misleading the court have broadly increased in recent years. In many instances it is the court that reports this risk to us.

14. [In the matter of David McCarey Lancaster](#), Solicitors Disciplinary Tribunal, 2007

15. [The Bond Solon annual expert witness survey](#), Bond Solon, 2014

16. The foundations of this right are the presumption of innocence, the right to silence and the privilege against self-incrimination. See the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art. 6.

17. See for example [R v Rochford, \[2010\] EWCA Crim 1928](#), p.21 and 24, and on the public interest in the absolute nature of legal advice and litigation privilege see [Three Rivers District Council and others \(Respondents\) v. Governor and Company of the Bank of England \(Appellants\) \(2004\), \[2004\] UKHL 48](#), p.54.

Excessive litigation

Excessive litigation takes up court time and creates disproportionate costs.

The courts have made clear their disapproval of what they consider to be excessive litigation.¹⁸ Past examples have included significant adverse comment on the conduct of commercial cases that occupy court time to the detriment of other cases. Such cases can involve disproportionate valuations of the claim, wide-ranging allegations of impropriety and inappropriate volumes and tone of correspondence. The courts often accept that the case has been pursued in accordance with the client's instructions.

Although solicitors are not routinely obliged to challenge their own client's case, they must refrain from advancing arguments that they do not consider to be properly arguable and they must have regard to the proper administration of justice. The courts have noted that if solicitors engage in litigation that is disproportionate to the true facts at issue, their clients should expect to face costs calculated on the indemnity basis.

It is important to note that solicitors must be aware of the risks of going beyond their instructions in pursuing litigation. Should a client wish to impose limits on the means employed towards their goals, whether due to personal values of their own or their risk calculations, they should have their instructions respected.¹⁹

Breach of duty to the client

A common motive in these cases is the solicitor's personal benefit.

Predatory litigation involving clients

These are schemes, that can become widespread, where clients are induced to incur unnecessary legal costs.

The most visible examples have arisen from governmental, statutory or regulatory compensation schemes, where the involvement of litigation, or in some cases any legal professional, was essentially not required at all for the majority of claimants. Issues have included solicitors charging additional costs to their client when their fees were already being met by a compensation scheme, or not advising the client that they were entitled to claim directly.

Such schemes can become widespread. When they do, they are extremely visible, and risk harm to public confidence in the legal system. We have issued guidance about such schemes in the past.²⁰

18. See for example [Excalibur Ventures LLC v Texas Keystone Inc. and others](#), [2013] EWHC 4278 (Comm), 2013

19. [Privatising professionalism: client control of lawyers' ethics](#), Whelan, C. Ziv, N, Fordham Law Review, 2012

20. [Dealing with claims for mis-sold payment protection insurance \(PPI\)](#), SRA, 2012

Conducting knowingly unwinnable cases

This involves solicitors taking on weak or unwinnable cases, where a solicitor accepts instructions without making the potential costs and risks clear to the client. The use of conditional or contingency fee agreements can mitigate this risk because the solicitor has a financial stake in the outcome, but there is evidence of misuse of such agreements.

It is common for conditional fee agreements to include clauses that justifiably enable the solicitor to cancel the agreement subject to certain conditions. An example of probable misuse of such a clause involved a solicitor ending a conditional fee agreement and billing the client, citing reasons that were already known to the solicitor from the outset. The result was that the client had gained no benefit but incurred expense and a loss of time.

Conclusion

The risk of improper or abusive litigation is a priority for us, as detailed in the Risk Outlook 2014. Solicitors are officers of the court, and trust and confidence in the legal system will help the market operate in a way that benefits all of its stakeholders.

This report has highlighted some of the tensions between the differing duties owed when conducting litigation. Managing these duties correctly is a critical task for solicitors engaged in litigation.

Many of the examples in this report demonstrate the challenges solicitors face on a case by case basis.

We have also discussed predatory litigation schemes, that can become widespread and cause harm to many consumers. Those who cross the line into misleading the courts or abusing the litigation process should have no doubt that such conduct can attract serious consequences.

There will always be complex situations where maintaining the correct balance between duties is not simple and all matters must of course be decided on the facts. It is important for solicitors to recognise their wider duties and not to rationalise misconduct on the mistaken basis that their only duty is to their client.

In walking the line between their duties to clients, the court, third parties and to the public interest, solicitors' surest guides are their integrity and independence.

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