

# Guidance

## Guidance

### Conduct in disputes

#### *Conduct in disputes*

Published: 4 March 2022

#### *Status*

This guidance is to help you understand your obligations and how to comply with them. We will have regard to it when exercising our regulatory functions.

#### *Who is this guidance for?*

All firms and individuals we regulate who conduct litigation and who give dispute resolution and pre-action advice.

#### *Purpose of this guidance*

To help you understand the application of our Principles and Codes of Conduct [<https://www.sra.org.uk/solicitors/standards-regulations/>] to these activities. As well as to highlight the different duties that you may owe to the court, to clients and to third parties (such as witnesses and opponents) in litigation. We describe situations in which these duties are not properly balanced to help illustrate how these can arise in practice and the serious consequences that can follow.

There will be situations where maintaining the correct balance between these different duties is not a simple exercise. This guidance is designed to help you identify the right course of action in such situations.

We are aware of concerns surrounding Strategic Lawsuits against Public Participation (SLAPP). This is a term commonly used to describe the misuse of the legal system, and the bringing or threatening of proceedings, in order to discourage public criticism or action. For example, cases in which the underlying intention is to stifle the reporting or the investigation of serious concerns of corruption or money laundering by using improper and abusive litigation tactics.

Features of these cases may include:

- making excessive or meritless claims, aggressive and intimidating threats
- otherwise acting in a way which fails to meet the wider public interest principles

- duties to which solicitors must have regard, and which are highlighted in this guidance.

To help ensure compliance, you should always be vigilant in scrutinising your own and others' conduct in disputes you are involved in. The behaviours described in this guidance can be evidence of misconduct capable of amounting to a serious breach of our regulatory arrangements, and can inform your duty to report. This will help us to consider whether a serious breach of our regulatory arrangements has occurred. Read see our guidance on reporting and notification obligations

[<https://www.sra.org.uk/solicitors/guidance/reporting-notification-obligations/>].

## *Standards and Regulations*

The duties of a solicitor when conducting litigation are set out in our Principles and Codes of Conduct.

### *Our Principles*

Our Principles state that solicitors should always act:

**Principle 1:** in a way that upholds the constitutional principle of the rule of law and the proper administration of justice

**Principle 2:** in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons

**Principle 3:** with independence

**Principle 4:** with honesty

**Principle 5:** with integrity

**Principle 7:** in the best interests of each client

Should the Principles come into conflict, those which safeguard the wider public interest take precedence over an individual client's interests. These include the rule of law and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services.

You should, where relevant, inform your client of the circumstances in which your duty to the court and other professional obligations will outweigh your duty to them. For example, you must not allow a client to knowingly mislead the court in order to further their case.

Independence (Principle 3) clearly includes independence from the client. This has also been explained by the Solicitors Disciplinary Tribunal (SDT):

'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 to do it' (In the matter of Paul Francis Simms, SDT, 2002).

### *Our Codes of Conduct*

The standards in our Code of Conduct for Solicitors, RELs and RFLs [<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/>] (also reflected in our Code of Conduct for Firms [<https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/>] ) help those conducting litigation to understand the standards which apply specifically in that area of work.

For example, paragraph 1 of the Code of Conduct for Solicitors emphasises the importance for all those conducting litigation to maintain trust and act fairly.

Paragraph 1.2 states that you must not 'abuse your position by taking unfair advantage of clients or others'. Paragraph 1.4 states that you must not mislead, or attempt to mislead your clients, the court or others, either by your own acts or omissions or by allowing or being complicit in the acts or omissions of others (including your client)'.

Paragraph 2 highlights further specific duties to the court. These include:

- not seeking to influence the substance of evidence (paragraph 2.2)
- only making assertions or putting forward statements, representations or submissions to the court or others which are properly arguable (paragraph 2.4)
- drawing the court's attention to procedural irregularities which are likely to have a material effect on the outcome of the proceedings (paragraph 2.7).

### *Situations where these duties have not been properly balanced*

The following situations describe unacceptable behaviours and how these might arise in practice. They look at both pre-action activity, including matters settled out of court, as well as conduct in legal proceedings. We then illustrate some situations with case studies that we have seen in practice at the end of this guidance.

These are examples of where solicitors have failed to balance properly duties owed in the public interest, to the court, to their client and to certain third parties. Some of the situations involve the solicitor improperly prioritising the client's interests above others. They include situations where duties owed to others and to the court have been overlooked. In others, even the client's best interests have not been served.

## *1. Making allegations without merit*

This involves solicitors bringing claims with insufficient investigation of their merits or of the underlying legal background. We understand, for example, that this has occurred in relation to some disrepair claims against social landlords. This is where claims have been issued before a proper inspection or survey has taken place and disrepair has been alleged where none exists.

Solicitors bringing claims may be reckless as to the merits of the case - or actively uninterested in the merits - and aim to pressure on an opponent to settle the case outside of court.

Some solicitors rely on the asymmetry of legal understanding which may exist between the defendant and the solicitor.

There have also been cases where letters of claim included a threat to reveal publicly embarrassing information if the opponent fails to settle or an unjustified threat of liability for significant costs. Such an approach could amount to a failure to act with integrity.

Threatening to issue proceedings, or to defend a claim in such cases, can also result in solicitors failing to act in the best interests of their clients. Or where their clients are encouraged to proceed with litigation where there is little legal merit in doing so. This might arise because of a conflict with the solicitor's own interest in generating fee income. Or where a solicitor wants to pursue the litigation notwithstanding the lack of merit in order to keep a longstanding client 'happy', and fails to act with sufficient independence.

Improper tactics such as these can also be seen in some group actions. In some cases, actions have been instigated in circumstances where the law firm carefully selects the lead case. However little has been done to check the validity of other claims made by individuals approached by the firm or by introducers. This is not in the interests of clients and can lead to a perceived risk of higher costs and damages, creating undue and inappropriate pressure on defendants to settle out of court.

Read case study 1 [<https://www.sra.org.uk/solicitors/guidance/conduct-disputes/#case1>]  
– Making allegations without merit: holiday sickness claims

## *2. Pursuing litigation for improper purposes*

This involves the threat of litigation or the making of counterclaims and defence arguments for reasons that are not connected to resolving genuine disputes or advancing legal rights.

For example, the purpose could be to delay deportation in an immigration matter as illustrated in the second case study.

As mentioned above in the context of SLAPP, it might also involve making allegations without merit where the sole purpose is to stifle valid public discourse. Or action in respect of serious concerns of corruption or money laundering.

The rule of law and our legal system provides that there is a right to legal advice and representation for all. However, proceedings must be pursued properly and that means making sure that duties to a client do not override wider public interest obligations and duties to the court.

Further, when exercising your reporting duties, your decision to report - or threatening to - must not be improperly used for tactical reasons to attempt to influence another party's behaviour or the progress of the litigation. If you do this, you run the risk that you will be in breach of your obligations and subject to investigation by us.

Read case study 2 [#case2] – Pursuing litigation for improper purposes: immigration solicitor struck off by the SDT for abuse of the appeals process

### *3. Taking unfair advantage*

Paragraph 1.2 of our Code of Conduct for Solicitors says that 'you must not abuse your position by taking unfair advantage of clients or others.'

In advancing a client's interests, solicitors must be careful not to take unfair advantage of an opponent or other third parties such as witnesses.

Special care is needed when dealing with or corresponding with an opponent who is unrepresented or vulnerable. Solicitors must make sure that such opponents are not taken advantage of, for example, by being given artificially short or wholly unnecessary deadlines to reply to correspondence.

Further, duties to the court and proper administration of justice may require solicitors to take steps to assist the court and litigant in person which may not have been required with a represented opponent.

Litigation will often involve putting a case against another party in strong terms. However, breaches of our standards can arise from oppressive behaviour and tactics including include:

- threatening litigation where there is no proper legal basis for a claim
- making exaggerated claims of adverse consequences including alleging liability for costs that are not legally recoverable
- sending excessively legalistic letters with the aim of intimidating particularly unrepresented or lay parties
- sending letters in abusive, intimidating or aggressive tone or language

Read case study 3 [#case3] – Taking unfair advantage: non – disclosure agreements (NDAs) and harassment

#### *4. Misleading the court*

Paragraph 1.4 of the Code of Conduct for Solicitors sets out the requirement not to mislead the court, the client or others.

Solicitors who are complicit with their client in misleading 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'. Examples include:

- knowingly helping a criminal client to create a false alibi
- attempting to convince expert witnesses to alter their reports for the benefit of a solicitor's client
- knowing that a client has obtained information for use in their case by illegal means (such as by phone hacking or improper surveillance methods) but helping the client to provide a false explanation of where the evidence came from
- failing to disclose relevant evidence or authorities
- making false or misleading statements
- making applications to the court (for example, solely to delay proceedings and increase costs) which serve no useful purpose in upholding the rule of law or the proper administration of justice.

Read case study 4 [#case4] – Misleading the Court: hearing loss claims

#### *5. Conducting excessive or aggressive litigation*

This kind of conduct, whether in litigation or pre-action advice, can create disproportionate costs, cause distress and anxiety for the subjected parties and damage public trust and confidence in the profession.

The courts have made clear their disapproval of what they consider to be excessive litigation (see for example *Excalibur Ventures LLC v Texas Keystone Inc and others* [2013] EWHC 4278 (Comm) [2013]).

They have also criticised the conduct of cases that occupy court time to the detriment of others. Such cases can involve disproportionate valuations of the claim, unduly wide-ranging allegations of impropriety and inappropriate volumes of correspondence.

The courts often accept that such cases have been pursued in accordance with a client's instructions. However, while solicitors are responsible for the strategy of their client's case, they cannot abrogate their responsibility to

the court and to regulatory principles and codes, on the basis that they are acting on their client's instructions alone.

Although solicitors are not routinely obliged to challenge their own client's case, they do have a duty to interrogate and engage properly with the legal and evidential merits. They must not advance arguments that they do not consider to be properly arguable and they must have regard to the rule of law and the proper administration of justice.

Equally, taking on or defending weak cases without making the potential costs, risks and merits clear to the client, may mean solicitors fail to act in their client's best interests. They may also be breaching other regulatory principles.

### *Further help*

If you require further assistance, please contact the Professional Ethics helpline [<https://www.sra.org.uk/contactus/>] .

## *Case studies*

### *Case study 1: Making allegations without merit: holiday sickness claims*

Between 2013 and 2017 there was a five-fold increase in claims against hotels for gastric illness suffered by holiday makers. We received numerous reports of cases where claims had been dismissed as dishonest, leading to costs orders against claimants and criminal prosecutions.

Our concern was that firms were accepting cases from introducers who had recruited claimants by some form of cold calling. And that firms were not investigating the merits of cases before raising them with defendants and seeking settlement. In some of these cases, firms had also sought unreasonable costs for a limited amount of work.

While in many of these cases firms had not investigated the evidence available, in some the firms had even actively advised their clients to destroy evidence which might harm their case.

We have warned solicitors of concerns that many holiday sickness claims might not be genuine. Firms that do not take account of these signs and conduct questionable cases will face regulatory action.

### *Case study 2: Pursuing litigation for improper purposes: immigration solicitor struck off by the SDT for abuse of the appeals process*

The SDT has struck off solicitors for abusing the court system by bringing hopeless appeals following immigration decisions. In one particular case, a solicitor made a practice of bringing last minute challenges to removal decisions. In one of these challenges, the solicitor left out important information which would have meant that their submissions and challenge would have been rejected.

The Immigration Tribunal found that the solicitor's appeals had no legal merit. And that they had designed them to exploit a 'weakspot' in the judicial system to delay deportations where there was no justification for doing so.

After we investigated the solicitor's conduct was referred to the SDT. They found that the solicitor's actions had demonstrated a lack of integrity and they were struck off the roll. On appeal, the High Court upheld this decision commenting that the deterrent effect of the decision was an important consideration for the SDT when deciding on sanction.

### *Case study 3: Taking unfair advantage: non-disclosure agreements (NDAs) and harassment*

The role of solicitors in drafting NDAs in relation to allegations of harassment has received widespread public and political attention.

There are legitimate uses for these agreements, but solicitors must not threaten consequences that cannot legally be enforced. In particular, solicitors must not seek to prevent anyone from reporting offences or co-operating with a criminal investigation and other legal processes, including influencing the evidence they give. They must also not prevent someone who has signed an NDA from keeping a copy of the agreement.

People who have experienced some form of harassment may well be vulnerable, in large part because of the harassment itself. Solicitors need to carefully consider this when communicating with them and when drafting an NDA.

There have also been allegations of employers who solicitors represent threatening to give a hostile reference or otherwise to penalise a victim if they do not agree to sign an NDA. Other victims have reported being given the impression by a solicitor that they would be imprisoned if they did not comply with an NDA.

A solicitor will face disciplinary action if they are complicit in unreasonable pressure to take unfair advantage of a victim or an unrepresented person on the other side. Similar action will also follow if they are also effectively complicit in seeking to conceal criminal activity.

Such conduct might also involve serious criminal offences as well as professional misconduct. Attempts for example to discourage or limit



disclosure of evidence in civil or criminal proceedings can amount to perverting the course of justice.

It might be in the best interests of a client to avoid publicity concerning allegations of sexual misconduct. However, the duty to the client does not override the solicitor's duties to:

- uphold the proper administration of justice
- act independently
- behave in a way that upholds public trust and confidence in the solicitor's profession.

Our warning notice [<https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/>] on the use of NDAs provides more detail on the issues involved.

#### ***Case study 4: Misleading the court: hearing loss claims***

A senior partner and solicitor employee were both struck off by the SDT after bringing a large number of noise-induced hearing claims which were mishandled and then cancelled.

The firm's failings included submitting claims after the final day for service, a failure to obtain proper medical evidence and misleading the other side.

The partner involved had tried to conceal the fact that their own failings had led to cases being struck out whilst making misleading statements to the court. These included saying that delays in obtaining/disclosing a medical report were due to experts failing to respond rather than because of his own shortcomings. A client's witness statement had also been substantively altered; from the client being unable to wear hearing protection provided by their employer, to them not recalling any protection being provided at all.