Solicitors Regulation Authority

Warning notice
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Strategic Lawsuits against Public Participation (SLAPPs)

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Status

This document 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 warning notice relevant to?

This warning notice is relevant to all firms and individuals we regulate who conduct litigation and who give dispute resolution and pre-action advice.

Our concerns

There is public concern - and we are concerned too - that solicitors and law firms are pursuing a type of abusive litigation, known as strategic lawsuits against public participation (SLAPPs), on behalf of their clients.

The term SLAPP is commonly used to describe an alleged misuse of the legal system, and the bringing or threatening of proceedings, in order to harass or intimidate another who could be criticising or holding them account for their actions and thereby discouraging scrutiny of matters in the public interest.

The key aim of a SLAPP is to prevent publication on matters of public importance, such as academic research, whistleblowing or campaigning or investigative journalism. Claims of defamation or invasion of privacy are the causes of action most associated with SLAPPs, but other causes of action (such as breach of confidence) could also be used for this purpose.

The government has proposed a three-part test to identify a SLAPP claim that would, under its proposed reforms, be subject to early dismissal as a result:

1. That the case relates to a public interest issue.
2. That it has some features of an abuse of process.

3. That it has insufficient evidence of merit to warrant further judicial consideration.

Regardless of whether or not a case fulfils all three limbs of the above test, we are able to take action in respect of abusive conduct. SLAPP threats, if they achieve their goals, often do not reach court. Again, this does not prevent us from investigating complaints.

Examples of abusive conduct both before, in the lead up to and during litigation are given in our recent guidance, Conduct in Disputes [https://www.sra.org.uk/solicitors/guidance/conduct-disputes/] . This involves the use or threat of litigation for reasons that are not connected to resolving genuine disputes or advancing legal rights. Purposes can include silencing criticism or stalling another process. An aim may often be to use the threat of cost or delay to achieve these outcomes. Our guidance also highlights that it is improper to bring cases or allegations without merit, or to do so in an oppressive, threatening or abusive manner.

Making advice and legal representation available to all is in the public interest. This includes taking action to prevent or remedy the infringing of a client's rights in respect of their privacy and their reputation. It is not in the public interest for false or misleading information to be needlessly published, and lawyers can have a legitimate role in encouraging journalists and others to ensure that what is published is legal and accurate.

We also recognise that in the course of conduct leading up to and including litigation, lawyers will need to act in defence of their client's interests and that correspondence will sometimes properly be robust or formal and lengthy – for instance, where this is strictly necessary in order to comply with a pre-action protocol.

However, proceedings must be pursued properly, and that means making sure that representing your client's interests does not override wider public interest obligations and duties to the courts.

The Standards and Regulations

You must comply with the Principles [https://www.sra.org.uk/solicitors/standards-regulations/principles/] and in particular:

- Principle 1 - act in a way that upholds the constitutional principle of the rule of law and the proper administration of justice
- Principle 2 – act in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons
- Principle 3 – act with independence
- Principle 4 - act with honesty

- Principle 5 - act with integrity

You must also comply with the relevant paragraphs in the Code of Conduct for Solicitors, RELs and RFLs [https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/] and the Code of Conduct for Firms [https://www.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/] where applicable. For example:

- Paragraph 1.2 of the Code of Conduct for Solicitors states that you must not 'abuse your position by taking unfair advantage of clients or others'.
- Paragraph 1.4 of the Code of Conduct for Solicitors 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 imposes obligations including:
  - 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)

You should have regard to our requirements under Code of Conduct for Solicitors, RELs and RFLs paragraphs 7.7, 7.8 and 7.9 regarding your obligations to make reports to us, and to not subject any person to detrimental treatment for making or proposing to make such a report as a result of their obligation to us. You may also wish to have regard to our warning notice on the use of non-disclosure agreements [https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/] .

Our expectations

Identifying SLAPPs

We expect you to be able to identify proposed courses of action (including pre-action) that could be defined as SLAPPs, or are otherwise abusive, and decline to act in this way. We expect you to advise clients against pursuing a course which amounts to abusive conduct, including making any threats in correspondence which are unjustified or illegal.

The following are red flags or features which are commonly associated with SLAPPs. Although they might not by themselves be evidence of misconduct, nor will they necessarily be present in all cases, they might help you to identify a proposed SLAPP:

- The target is a proposed publication on a subject of public importance, such as academic research, whistle-blowing or investigative journalism.

- Your instructions are to act solely in a public relations capacity, for example by responding to pre-publication correspondence with journalists about a story which is true and does not relate to private information.
- The client asks that the claim is targeted only against individuals (where other corporate defendants are more appropriate), is brought under multiple causes of action or jurisdictions/fora, and/or in a jurisdiction unconnected with the parties or events.

Conduct of the case

There are a number of behaviours commonly associated with SLAPPs. Those which we consider matters of concern and are likely to result in regulatory action include:

- Seeking to threaten or advance meritless claims, including in pre-action correspondence, and including claims where it should be clear that a defence to that type of claim will be successful based on what you know.
- Claiming remedies to which the client would not be entitled on the facts, such as imprisonment upon a civil claim, or specific or exaggerated costs consequences.
- Making unduly aggressive and intimidating threats, such as threats which are intended to intimidate recipients into not seeking their own legal advice.
- Sending an excessive number of letters that are disproportionate to the issues in dispute and the responses received.
- Sending correspondence with restrictive labels (see below) that are intimidating but inaccurate.
- Pursuing unnecessary and onerous procedural applications, intended to waste time or increase costs, such as for excessive disclosure.

As stated above, an important consideration is whether the claim is meritless, or - in light of your understanding of the defences that are available to your opponent - is bound to fail.

We expect you to take reasonable steps to satisfy yourself that a claim is properly arguable before putting it forward, either in correspondence or via an issued claim. We expect you to have considered the prospects of a proposed course of action being unsuccessful or counter-productive, and to have advised your clients properly before starting.

In a defamation context, relevant factors to take into account might include:

- The truth of the alleged defamatory statements
- Insufficient connection to the jurisdiction (S.9 Defamation Act 2013).

- Where the proposed claimant is a corporation, will the client be able to evidence a likelihood of serious financial loss (S.1 Defamation Act 2013).
- Whether the proposed claimant is a governmental body (*Derbyshire County Council v Times Newspapers [1993] AC 534)*.
- Any inability to acquire a pre-publication injunction due to the rule in *Bonnard v Perryman [1891] 2 Ch 269*
- The prospects of early strike out based on the case of *Jameel v Dow Jones & Co Inc [2005] EWCA Civ 75*, or on other grounds (such as any anti-SLAPP legislation as and when it comes into force)

In a privacy or breach of confidence context a claim will be unarguable for example if it focuses on information which cannot properly be regarded as either private or confidential.

Labelling correspondence

We expect you to ensure that you do not mislead recipients of your correspondence, and to take particular care in this regard where that recipient may be vulnerable or unrepresented.

One way this can happen in this context is by labelling or marking correspondence 'not for publication', 'strictly private and confidential' and/or 'without prejudice' when the conditions for using those terms are not fulfilled.

We accept that marking a letter with such terms might be necessary if (for instance) an individual needs to disclose private and confidential information in order to disprove facts intended for publication. If so, it might also serve a purpose in ensuring correspondence is not read by an unintended recipient and/or to inform the recipient that they cannot rely on the defence of consent if they choose to publish any of the relevant material. Recipients might also properly be warned as to the legal risks of publication of such correspondence (which may include aggravation of any damages payable).

However, you should carefully consider what proper reasons you have for labelling correspondence in these ways, and whether further explanation is required where the recipient might be vulnerable or uninformed. Such markings cannot unilaterally impose a duty of privacy or confidentiality where one does not already exist. Clients should be advised of this and warned of the risks that a recipient might properly publish correspondence which is not subject to a pre-existing duty of confidence or privacy.

If the client is not content to bear this risk, they can be advised of other options (see paragraphs 20 to 28 of Practice Guidance - Civil Non-Disclosure Orders July 2011 (judiciary.uk) [https://www.judiciary.uk/wp-

content/uploads/JCO/Documents/Guidance/practice-guidance-civil-non-disclosure-orders-july2011.pdf] . You should ensure that you are satisfied that the recipient will know they are allowed to seek legal advice on your correspondence. Where a recipient indicates they wish to publish correspondence they have received, they must not be misled as to the consequences. Unless there is a specific legal reason which prevents this, recipients of legal letters should be able to generally disclose that they have received them.

Equally, correspondence should not be marked as 'without prejudice' if that correspondence does not fulfil the conditions for that label. You should consider whether the communication represents a genuine attempt to compromise an existing dispute. There should ordinarily be no need to apply it to correspondence which does not offer any concessions and only argues your case and seeks concessions from the other side. You should also consider whether you may wish to rely on the correspondence in any proceedings without the recipient's consent, including to evidence your pre-action conduct.

Enforcement action

If an issue arises, failure to have proper regard to this warning notice is likely to lead to disciplinary action.

For further information on our approach to taking regulatory action, see our Enforcement Strategy [https://www.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy/?epiprojects=3] and in particular our guidance on Conduct in Disputes [https://www.sra.org.uk/solicitors/guidance/conduct-disputes/] .

Further guidance

For guidance on any of the above conduct matters contact theProfessional Ethics helpline [https://www.sra.org.uk/contact-us/]