



## Balancing duties in litigation

27 November 2018

[Download Balancing duties in litigation \(PDF 18 pages, 342KB\)](#)

[\[https://qltt.sra.org.uk/globalassets/documents/solicitors/freedom-in-practice/balancing-duties-in-litigation.pdf\]](https://qltt.sra.org.uk/globalassets/documents/solicitors/freedom-in-practice/balancing-duties-in-litigation.pdf)

### Executive summary

This report updates our previous risk paper on balancing duties in litigation, published in March 2015. It discusses the differing duties owed by solicitors in litigation and examines the ways in which misconduct can arise. This report is a useful, up-to-date resource for law firms and solicitors, with examples of the challenges faced when balancing these duties.

What has emerged since our first paper is the continued conflict between the principle of acting in the best interests of each client and other, often higher-priority principles, such as acting with integrity or upholding the rule of law and proper administration of justice. This has been particularly relevant for those that write non-disclosure agreements (NDAs) in employment issues. NDAs have a legitimate role to play, but it has become clear that some might include clauses that seek to prevent lawful disclosure of issues such as discrimination, harassment or even sexual abuse. We published a warning notice in March to remind the profession of its responsibilities in this area.

The emerging risk of progressing holiday sickness claims that turn out to be bogus also features in this paper. The number of claims being made has started to decline, but there is no room for complacency.

We have also seen a steady increase in reports of solicitors misleading the courts. These have risen more than 50 percent in the last five years, which might be because of better reporting.

What has not changed is the fact that although solicitors must advance their clients' cases, they are not 'hired guns' whose only duty is to that client. They also owe duties to the courts, third parties and to the public interest.

Our paper looks at improper or abusive litigation, which includes:

- predatory litigation
- predatory litigation involving clients
- abuse of the process
- taking unfair advantage
- misleading the court
- excessive or aggressive litigation
- conducting knowingly unwinnable cases.

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. 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.

Managing work when duties might conflict is an essential element of legal professional ethics. Failure to act with integrity or ethics is a priority risk in our Risk Outlook 2018/2019 and has the potential to significantly undermine the proper administration of justice and public confidence in legal services.

For guidance on matters of conduct please refer to our [guidance](https://qltt.sra.org.uk/solicitors/guidance/) [<https://qltt.sra.org.uk/solicitors/guidance/>] or contact our [Professional ethics team](https://qltt.sra.org.uk/home/contact-us/). [<https://qltt.sra.org.uk/home/contact-us/>]

[Open all](#) [#]

## **Introduction**

Litigation is a reserved legal activity. It is a highly visible and very important aspect of legal practice, as it affects people's lives, livelihoods and rights. The integrity of our justice system is a reason for its status as an international forum of choice.

Solicitors are officers of the court and their overriding duty is to the rule of law and the administration of justice. Nowhere is that more apparent than when conducting litigation.

Improper or abusive litigation was highlighted as an issue in the Risk Outlook 2018/2019, within the Priority Risk of the lack of integrity and ethics.

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 their client with their duties to the court, third parties and the wider public interest.

Solicitors owe duties to multiple parties. In some cases, acting to advance a client's interest has led solicitors to disregard their wider duties. Clear-cut cases of this kind 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, public confidence in the legal system, which underpins the rule of law, is put at risk. And individuals, many of whom might be vulnerable, could be harmed.

We also sometimes see unethical 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, causing clients to incur unnecessary costs by not being clear about the risks of pursuing a litigation claim or by not making it clear that a solicitor is not needed for some types of claims. Again, these issues have the potential to cause serious harm to individuals and to confidence in the legal system.

## **Integrity and ethics in litigation**

Although solicitors must advance their clients' cases in accordance with the client's instructions and interests, 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 Principles 2011 set out the key ethical requirements on firms we regulate and the individuals working in those firms. Where this paper refers to specific principles, codes or rules, it refers to those in force at the time of publication. Although we will be introducing new principles, codes and rules from 2019 onwards, these will not change the basic ethical duties discussed here.

The principles include the duties:

- to act in the best interests of each client
- not to allow independence to be compromised
- 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. However, it is not always straightforward to navigate this. Solicitors must use their professional judgment and experience to recognise any conflict and find the correct course of action for the specific situation.

### **Balancing duties in litigation**

The following examples of reports to us show the difficulties some solicitors have experienced in balancing the duties set out above. 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 improperly prioritising the client's interest over their other duties:

- Predatory litigation against third parties: the solicitor, in the interest of the client, threatens litigation to obtain settlement, often from several opponents. The cases sometimes have no real merit, but the cost of settlement is less than the financial, emotional or reputational cost of fighting the claim.
- Abuse of the litigation process: the 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 an unrepresented third party: for example, by exploiting another party's procedural errors or their lack of legal knowledge in certain circumstances. This includes using overbearing techniques such as sending threatening or legalistic letters directly to people, including those who might be vulnerable.
- Misleading the court: the solicitor knowingly or recklessly gives false information to the court or is complicit in allowing it to be given.
- Excessive or aggressive litigation: the solicitor fails to consider their other duties when following a client's wish to pursue aggressive and, in particular, speculative litigation. This includes repeatedly litigating the same point and using overbearing techniques. One commercial case involved one side accusing the other of criminal conduct without any



cause. The judge described the case as having been “pursued as if it were an act of war”.

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

- Predatory litigation: where clients are encouraged to proceed with litigation where there is little or no legal merit, or where litigation is not actually required. For example, by touting for claimants in government-backed compensation schemes that do not need the claimant to have legal advice, such as payment protection insurance (PPI) compensation, or the mineworkers’ compensation scheme.
- 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 often also include the predatory litigation described above, which can become widespread and affect very large numbers of individuals.

### **Scope of this risk**

Most of the issues described in this report occur infrequently, though some can become widespread, such as PPI claims.

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, which might be because of better reporting.

Maintaining the high ethical standards that the public is entitled to expect is a critical task for the regulatory system. In addition to taking action when things go wrong, we also take steps to embed the necessary standards in training and in practice.

Our reform of legal education and training, including the introduction of the Solicitors Qualifying Examination (SQE), is aimed at supporting this. Our Competence Statement captures the key activities required of a solicitor, helping to assure the maintenance of standards. We are also reviewing how to maintain standards in advocacy.

### **Reports of misleading a court**

**2012 2013 2014 2015 2016 2017**

585 697 777 815 829 887

## **[Legal and regulatory background](#)**

### **Legislation**

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 that:

- a. authorised persons should act within dependence and integrity
- b. authorised persons should maintain proper standards of work
- c. authorised persons should act in the best interests of their clients
- d. 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. 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'." [1](#) <sup>[#n1]</sup>

It is essential to the public interest in justice, in an adversarial legal system, that solicitors must be able to take cases forward fearlessly and effectively. There are limits to this, however, including that:

- solicitors must bring and defend cases honestly
- clients and sometimes solicitors have to sign statements of truth
- it is improper to mislead the court or other parties
- the prosecution must disclose documents that might damage a client's case if they are relevant to the case, unless these are privileged.

If a solicitor knows that a client's case is not honestly brought, they must not act. Where there is suspicion or the context is high-risk, the solicitor's duty to the administration of justice, the court and the public interest demand proper checks of the instructions and evidence.

## The Handbook and the solicitor's duties

These issues are reflected in the SRA Handbook. We are introducing new principles, codes and rules from 2019 onwards, however these will not change the core ethical duties of a solicitor. The discussion below covers the way those duties are set out in the Handbook at the time of this report's publication.

The primary duties of the solicitor to various parties are clear and are set out in our principles. The outcomes that firms and regulated individuals must achieve reflect the importance of steering the course between these principles in particular:

- **Principle 1** requires solicitors to uphold the rule of law and the proper administration of justice.



- **Principle 2** sets out that solicitors must act with integrity.
- **Principle 3** requires solicitors not to allow their independence to be compromised.
- **Principle 4** sets out the obligation of solicitors 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 our Code of Conduct 2011 confirms that solicitors owe duties beyond those to their clients and that those duties can limit their right to pursue the client's case however the client wishes. It states, "you provide services to your clients in a manner which protects their interests in their matter, subject to the proper administration of justice". Outcome 1.3 clarifies this by requiring a solicitor to comply with the law and the Code of Conduct when deciding whether to act or to cease acting.

### **The solicitor and the court**

The outcomes regarding duties to the court areas follows:

- **Outcome 5.1** bars solicitors from intentionally, knowingly or recklessly deceiving the court.
- **Outcome 5.2** requires that solicitors are not complicit with another's deception of the court.

Indicative behaviour 5.5 describes the implication of this. If the solicitor knows that their client is committing perjury or other wise misleading the court in any matter, then they should cease to act. The only exception is if the client agrees to inform the court of the deception.

### **Types of improper or abusive litigation**

Some cases of improper or abusive litigation can have severe consequences and can affect large numbers of people. However, these do not reflect widespread issues of this nature. Conflicts of duties can be highly specific to the case in which they occur.

Where these cases arise in civil litigation, most examples relate to the conduct of the claimant's solicitor. This reflects the fact that the claimant has more choice over whether to enter into litigation than the respondent does. And some breaches can only occur in relation to the side that is threatening proceedings. Ethical issues in court proceedings, however, are not exclusive to the claimant's side. Solicitors acting for those defending claims or challenges also need to make sure that they act with integrity and comply with their other duties. When dealing with those who wish to defend a hopeless case, for example, solicitors must be as careful as those acting for claimants who wish to start one. Either party could seek to mislead the court, either directly or, in the case of the prosecution, failing to disclose important evidence, precedents or information.

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**

Predatory litigation generally involves solicitors bringing large numbers of claims with limited investigation of their individual merits or of the underlying legal background. The idea is usually that the cost in time and money of proceedings, or the threat of public embarrassment, will lead to opponents settling cases that might have no real merit.

For example, a law firm might send letters of claim to large numbers of individuals alleging, on limited evidence, that they have breached the intellectual property of their client. There requested settlement is usually significantly lower than the potential cost of fighting the claim, which encourages people to settle the claim before it goes to court and without first seeking their own legal advice.

In some of these cases, there is little evidence that there was an intention to bring the case to court. It is possible that a court would not make an award for the claim if it did proceed. 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, for example between the defendant and the solicitor, which favours 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 approaches have been described in the House of Lords as 'blackmail' [\[21\]](#) and could amount to a failure to act with integrity.

In other cases, mass claims are made against one defendant, where a law firm gets many people to sign up to a claim. Group actions in themselves can be legitimate, for example where there is a Group Litigation Order or where a court has agreed to consolidate claims. However, in some cases the firm carefully selects the lead case but does little checks on most of the other claims. The volume of claims can lead to higher costs and damages on the defendant leading to settlement.

### **Spotlight on holiday sickness claims**

Between 2013 and 2017, there was a five fold increase in claims against hotels for gastric illness suffered on holiday.

We received numerous reports of cases where claims had been dismissed as dishonest, leading to costs orders against claimants and including criminal prosecutions. Our concern was that firms were accepting cases from introducers who had recruited claimants by some form of cold calling, and that





the firms were not investigating the merits of cases before raising them with defendants and seeking settlements. In some of these cases, the firms were seeking 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 actively advised their clients to destroy evidence which might harm their case.

In September 2017, we warned solicitors about the signs that holiday sickness claims might not be genuine. Firms that do not take account of these signs and conduct questionable cases may face regulatory action.<sup>[3](#)</sup>

### **Abuse of the litigation process**

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 harming commercial competitors, silencing criticism or stalling another process. The aim is to use the threat of cost or delay to achieve these outcomes.

Unlike predatory litigation, approaches are not usually made to many people and obtaining financial redress for the client is not the goal. For example, it could be to avoid deportation.

Whether or not a claim is abusive is often determined by the proportionality of the solicitor's actions on behalf of their client, and ultimately by the merits of their claim should it reach a court. We rely on the courts to recognise this misconduct and report it to us.

### **Case example: Immigration solicitor struck off for abuse of the appeals process**

The SDT struck a solicitor off the roll for abusing the court system by bringing hopeless appeals to immigration decisions. The solicitor had made a practice of bringing last-minute challenges to removal decisions. In one of these challenges, they left out important information which would have meant the submission would have been rejected.

The Immigration Tribunal found that the appeals had no legal merit and that the solicitor had designed them to exploit a "weak spot" in the judicial system to delay deportations where there was no justification.

The SDT found that the solicitor's actions had shown a lack of integrity. The solicitor appealed, but the High Court upheld the decision of the Tribunal. It found that the solicitor's actions had been an abuse of process and that it was suitable that deterrence was a consideration when making their decision.

### **Spotlight on non-disclosure agreements and harassment**

The role of solicitors in drafting NDAs in relation to allegations of harassment has received public and political attention.<sup>[4](#)</sup> This attention will continue. 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.

There have also been allegations of employers threatening to give a hostile reference or otherwise to penalise a victim if they do not agree to sign an NDA.<sup>5</sup> [\[#n5\]](#) Other victims have reported being given the impression by the solicitor that they would be imprisoned if they did not comply with the NDA.<sup>6</sup> [\[#n6\]](#) People that have experienced some form of harassment might be vulnerable, in part because of the harassment itself. Solicitors need to consider this when communicating with them and when drafting an NDA.

It might be in the interests of the client to avoid publicity for allegations, but the duty to the client does not override the solicitor's duties to uphold the proper administration of justice, act independently, and to behave in a way that maintains public trust in the provision of legal services.

A solicitor may 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
- are effectively complicit in seeking to conceal criminal activity.

Such conduct might also involve serious criminal offences. Attempts to discourage or limit disclosure of evidence to criminal or civil processes can amount to perverting the course of justice.

Our warning notice on NDAs provides more detail on the issues involved.<sup>7</sup> [\[#n7\]](#)

We take inappropriate behaviour in the workplace very seriously. For example, we have asked the largest firms that we regulate about how they prevent, and respond to allegations of, sexual harassment in the workplace. We have asked them to tell us about their staff training and how they support a person making an allegation of sexual harassment. We will share examples of good and poor practice.

## **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 or vulnerable. Solicitors will need to consider this duty in all cases, but particularly when faced with a party showing a simple lack of legal knowledge or obvious procedural misunderstandings.

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.

Indicative behaviour 11.7 in the Code of Conduct highlights that taking unfair advantage of an unrepresented party's lack of legal knowledge shows a failure to comply with duties to others. Special care should be taken when corresponding with lay or vulnerable opponents not to take advantage or use language that might intimidate them.<sup>8</sup> [\[#n8\]](#) Regulatory breaches can arise from



any oppressive or domineering tactics, regardless of whether misleading information is included. These tactics include:

- overbearing threats of claims or poor outcomes
- legalistic letters to minors or others who might be vulnerable
- threats of litigation where no legal claim arises
- claims of highly exaggerated adverse consequences.

Other examples include the use by in-house solicitors of trading styles that suggest that they are an independent firm, for example for debt collection work. Although trading styles themselves are not prohibited, it is important that they are not misleading. Outcome 8.1 makes this clear and we have warned solicitors about the publicity and information given to third parties.

## **Misleading the court**

Solicitors who are complicit in their client 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".<sup>9</sup>

Examples include:

- Knowingly helping a criminal client to create a false alibi, for which solicitors have been struck off.<sup>10</sup>
- Attempting to convince expert witnesses to alter their reports to the benefit of the solicitor's client
- Knowing that a client obtained information for use in their case by illegal means, but helping the client provide a false explanation of where the evidence came from.<sup>11</sup>

It is also possible for prosecuting solicitors to mislead the court by failing to disclose important evidence or precedents. In 2017, 916 criminal cases failed due to failures by the police or prosecution to disclose evidence that would have assisted the defence case, a number that has risen by 70 percent since 2014-15.<sup>12</sup>

Criminal defence work can involve a significant risk of conflict between duties where the solicitor knows or reasonably suspects that their client is in fact guilty, but the client wishes to plead not guilty. It is the defendant's right to require the state to prove its case.<sup>13</sup> It is in the public interest that the state be required to do this to the necessary 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 the duty of confidentiality and by legal professional privilege.<sup>14</sup>

Solicitors must still, however, take the greatest care not to mislead the court or to permit their client to do so. If their client continues to do so despite advice, the solicitor should cease to act.

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 misconduct to

US.

#### **Case example: Misleading the court in hearing loss claims**

A senior partner and solicitor employee were struck off by the SDT after bringing large numbers of noise-induced hearing loss claims which were mishandled and then cancelled. [15 \[n15\]](#)

The firm had:

- submitted claims after the final day for service
- failed to obtain proper medical evidence
- misled the other side.

The partner had tried to conceal the fact that their own failings had led to the cases being struck out, making misleading statements to the court. These included stating that a delayed report was because experts failed to respond, rather than because of the firm's own failures. They also changed the client's statement that they had been unable to wear hearing protection provided by their employer into a statement that the client could not recall any protection having been provided at all.

Misleading the court is a serious matter and those who do so can expect serious consequences.

#### **Case example: Misleading the court by failing to disclose evidence**

A Crown Court found that the prosecution in a criminal trial had materially misled it by failing to disclose evidence that supported the defence. [16 \[n16\]](#)

The case against the defendants was that they had been involved in an organised crime network supplying illegal drugs. The prosecution alleged that the defendants had met with the head of the network in prison and had agreed to participate in the conspiracy. During the trial, however, the defence learned that the police had secretly recorded the meeting. They obtained the tape, which showed that the parties had not discussed any criminal activity.

The court called the prosecuting barrister to account for why the prosecution had not disclosed this evidence. The judge stated that the prosecution had shown a disregard for their duty of disclosure that could undermine public confidence and had led to an unfair trial.

### **Excessive or aggressive 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. [17 \[n17\]](#) For example, they have criticised 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. Solicitors are responsible for the

strategy on their client's case and cannot disclaim responsibility on the basis of acting on instructions.

Although solicitors are not routinely obliged to challenge their own client's case, they must not advance arguments that they do not consider to be properly arguable and they must have regard to the proper administration of justice. The courts noted that where litigation that is disproportionate to the facts, solicitors' clients are likely to be ordered to pay costs calculated on the indemnity basis rather than the standard basis.

Solicitors should also 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 because of their own personal values or their risk calculations, then their solicitor should respect this.

### **Breach of duty to the client**

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

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

The most visible examples are from governmental, statutory or regulatory compensation schemes, where litigation, or in some cases any legal professional, was not required for most 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, for example we have warned solicitors about claims for mis-sold PPI. [18 \[n18\]](#)

### **Case example: Touting for claims where no action was required**

We have seen a pattern of online touting for clients to bring legal claims relating to mortgage interest issues. These related to a problem with miscalculated arrears. The Financial Conduct Authority (FCA) was aware of the issue and had identified the lenders and 750,000 borrowers involved. [19 \[n19\]](#) It had already instructed lenders to make refunds directly and without waiting to be contacted. In this instance, there was no need for anyone affected to instruct a lawyer or, indeed, for borrowers to take any action at all.

### **Conducting knowingly unwinable cases**

This involves solicitors taking on weak or unwinable 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.



Just as an unethical solicitor can agree to bring an unwinnable case that should not have been brought, they can agree to defend one that should have settled. The client, of course, is entitled to advance their rights and to seek to resist claims brought against them. The solicitor is, however, obliged to:

- point out what can actually be achieved
- advise the client on the proportionality of different courses of action in terms of costs
- remember that their duty is not only to the client.

It is common for conditional fee agreements to include clauses that allow 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**

Litigation is an important aspect of legal practice, as it affects people's lives, livelihoods and rights. Solicitors are officers of the court. Poor conduct or unethical behaviour in litigation can threaten the integrity of the justice system, as well as potentially causing harm to people. Such conduct is a priority risk in the Risk Outlook 2018/2019.

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 and other large scale breaches that can become widespread and cause harm to many people, as well as NDAs where those who have suffered discrimination might be vulnerable.

Those who cross the line into misleading the courts or abusing the litigation process should have no doubt that such conduct can lead to 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 maintaining the balance between all their duties - to clients, the court, third parties and to the public interest - solicitors' best guides are their integrity and independence.

## **SRA resources**

**Risk Outlook 2018/2019** [<https://qltt.sra.org.uk/archive/risk/outlook/risk-outlook-2018-2019/>]

**Guidance** [<https://qltt.sra.org.uk/solicitors/guidance/>] including warning notices



[Our Standards and Regulations](https://qltt.sra.org.uk/solicitors/standards-regulations/) [https://qltt.sra.org.uk/solicitors/standards-regulations/] including the Code of Conduct, principles, outcomes and indicative behaviours

[Competence Statement](https://qltt.sra.org.uk/solicitors/resources-archived/continuing-competence/cpd/competence-statement/) [https://qltt.sra.org.uk/solicitors/resources-archived/continuing-competence/cpd/competence-statement/]

[Solicitors Qualifying Examination \(SQE\)](https://qltt.sra.org.uk/become-solicitor/sqe/) [https://qltt.sra.org.uk/become-solicitor/sqe/] [Notes](#)

1. In the matter of Paul Francis Simms, Solicitors Disciplinary Tribunal, 2002
2. [Hansard, Lord Lucas, Column 1309, 2010](http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100126-0003.htm) [http://www.publications.parliament.uk/pa/ld200910/ldhansrd/text/100126-0003.htm]
3. Warning notice: holiday sickness claims, Solicitors Regulation Authority, 2017
4. Sexual harassment in the workplace: fifth report of session 2017–2019, House of Commons Women and Equality Committee, 2018
5. [Written evidence from a member of the public, House of Commons Women and Equality Committee, 2018](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/written/80083.html) [http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/written/80083.html]
6. [Oral evidence of Zelda Perkins, House of Commons Women and Equality Committee, 2018](http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/oral/80945.html) [http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/women-and-equalities-committee/sexual-harassment-in-the-workplace/oral/80945.html]
7. [Warning notice: use of non-disclosure agreements, Solicitors Regulation Authority, 2018](https://qltt.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/) [https://qltt.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/]
8. In the matter of Brian Miller and David Gore, Solicitors Disciplinary Tribunal, 2010
9. [LCJ uses Nightjack case to warn lawyers who mislead Court of “exemplary punishments”, Legal Futures, 2014](http://www.legalfutures.co.uk/latest-news/lcj-uses-nightjack-case-warn-lawyers-mislead-court-exemplary-punishments) [http://www.legalfutures.co.uk/latest-news/lcj-uses-nightjack-case-warn-lawyers-mislead-court-exemplary-punishments]
10. In the matter of David McCarey Lancaster, Solicitors Disciplinary Tribunal, 2007
11. This is known as “parallel construction”.
12. [Hundreds of cases dropped over evidence disclosure failings, BBC, 2018](https://www.bbc.co.uk/news/uk-42795058) [https://www.bbc.co.uk/news/uk-42795058]
13. 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.
14. See for example [R v Rochford, \[2010\] EWCA Crim 1928](http://www.bailii.org/ew/cases/EWCA/Crim/2010/1928.html) [http://www.bailii.org/ew/cases/EWCA/Crim/2010/1928.html], 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](http://www.bailii.org/uk/cases/UKHL/2004/48.html) [http://www.bailii.org/uk/cases/UKHL/2004/48.html]), [2004] UKHL 48, p.54.
15. <https://www.lawgazette.co.uk/news/pi-solicitors-banned-after-multiple-failings-on-hearing-loss-claims/5065848.article>
16. [Drug barons walk free as police hide evidence, Times, 2018](https://www.thetimes.co.uk/article/drug-barons-walk-free-as-police-hide-evidence-lz0pm6p9d) [https://www.thetimes.co.uk/article/drug-barons-walk-free-as-police-hide-evidence-lz0pm6p9d]
17. See for example [Excalibur Ventures LLC v Texas Keystone Inc and others, \[2013\] EWHC 4278 \(Comm\), 2013](http://www.bailii.org/ew/cases/EWHC/Comm/2013/4278.html) [http://www.bailii.org/ew/cases/EWHC/Comm/2013/4278.html]

18. Dealing with claims for mis-sold payment protection insurance, Solicitors Regulation Authority, 2012
19. [FCA to consult on mortgage payment shortfall remediation guidance](https://www.fca.org.uk/news/press-releases/fca-consult-mortgage-payment-shortfall-remediation-guidance), Financial Conduct Authority, 2016 [<https://www.fca.org.uk/news/press-releases/fca-consult-mortgage-payment-shortfall-remediation-guidance>]