

Conduct in disputes – new CRL guidance

Who is this guidance for?

All CILEX firms and individuals regulated by CILEX Regulation who conduct litigation and who give dispute resolution and pre-action advice.

In this guidance where we refer to 'litigators' this includes CILEX Litigation Practitioners and Advocates and CILEX members working in firms carrying out litigation under the supervision of an authorised person.

Purpose of this guidance

Whilst legal professionals are duty bound to represent their clients' best interests, they must not do so where the effect would be to undermine the rule of law and trust in the legal profession. Principle 5 of the CILEX Code of Conduct says that you must act competently, in the best interests of your client and respect client confidentiality, with Outcome 5.5 requiring that you act on your client's instructions except when to do so would involve a breach of the law or this Code.

There has recently been much greater focus on potential misuse of the legal system and on the 4th March 2022 the Solicitors Regulation Authority (SRA) updated its conduct on disputes guidance.

The behaviours described in their updated guidance are examples of possible misconduct capable of amounting to a serious breach of the profession's regulatory arrangements, which could lead to disciplinary action being taken.

In order to have a consistent approach across the legal professions, CILEX Regulation has adopted the basis of the SRA guidance, showing how we apply our Principles under the CILEX Code of Conduct to these activities and the different duties you have.

This guidance describes 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.

Strategic Litigation against Public Participation (SLAPP)

There has been considerable concern regarding these types of cases. This is a term commonly used to describe the misuse of the legal system, and the bringing or threatening of proceedings, for the purpose of discouraging 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 litigators must have regard, and which are highlighted in this guidance.

To help ensure compliance, you must always be vigilant in scrutinising your own and others' conduct in disputes you are involved in. Engaging 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.

Principles and Outcomes in the CILEX Code of Conduct

The duties of a CILEX member when conducting litigation are set out in the Principles in the CILEX Code of Conduct.

Our Principles

Our Principles state that you must:

Principle 1: uphold the rule of law and the impartial administration of justice.

Principle 2: maintain high standards of professional and personal conduct and justify public trust in you, your profession, and the provision of legal services.

Principle 3: behave with honesty and integrity,

Principle 5: act competently, in the best interests of your client and respect client confidentiality.

Principle 6: treat everyone fairly and without prejudice.

Principle 7: ensure your independence is not compromised.

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 profession and a safe and effective market for regulated legal services.

You must, 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.

In Principle 1 the outcomes are clear on this point. Outcome 1.1 says you must understand and comply with your primary and overriding duty to the court, obey court orders and do nothing which would place you in contempt; and outcome 1.2 says you must not knowingly or recklessly allow the court to be misled

With Principle 7 we would say that independence clearly includes independence from the client.

CILEX Code of Conduct

The outcomes in our Code of Conduct help those conducting litigation to understand the standards which apply specifically in that area of work.

For example, outcome 1.1 of the Code of Conduct emphasises the importance for all those conducting litigation to understand and comply with your primary and overriding duty to the court, obey court orders and do nothing which would place you in contempt.

Outcome 1.2 states that you must not knowingly or recklessly allow the court to be misled.

Outcome 2.2 highlights that you must not engage in any conduct that could undermine or affect adversely the confidence and trust placed in you and your profession by your client, your employer, professional colleagues, the public and others.

Outcome 3.2 says that you must not intentionally mislead anyone you deal with.

Situations where these duties have not been properly balanced

The following situations were used by the SRA in their guidance to 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 believe they are relevant to all those we regulate who conduct litigation.

These are examples in which legal professionals 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 litigator 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 a litigator bringing claims with insufficient investigation of their merits or of the underlying legal background, often with the aim to put pressure on an opponent to settle the case outside of court.

Some litigators rely on the different levels of understanding of the legal process/procedure which may exist between the defendant and the litigator.

There have also been cases where letters of claim included a threat to reveal to the public 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 (Principle 3).

Threatening to issue proceedings, defend a claim, or encouraging a client to proceed with litigation where there is little legal merit in doing so may also result in litigators failing to act in the best interests of their clients. This might arise because of a conflict with the litigator's own interest in generating fee income. Or where a litigator wants to pursue the litigation notwithstanding the lack of merit in order to keep a longstanding client 'happy' but 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 has selected carefully 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.

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Examples include some disrepair claims against social landlords, where claims have been issued before a proper inspection or survey has taken place and disrepair has been alleged where none exist. Other examples have involved fraudulent holiday sickness claims where there was no evidence of to support the claim.

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.

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 used improperly for tactical reasons to attempt to influence another party's behaviour or the progress of the litigation. If you do this, you will be in breach of your regulatory obligations and you run the risk of investigation run the risk by CILEx Regulation.

Another example might be the action to delay deportation where there is no merit in doing so in an immigration matter.

3. Taking unfair advantage

In advancing a client's interests, litigators 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. Litigators 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 litigators 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 unrepresented or lay parties
- sending letters in abusive, intimidating or aggressive tone or language

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4. Misleading the court

Litigators 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
- deliberate failure to disclose relevant evidence or authorities
- knowingly 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.

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 litigators are responsible for the strategy of their client's case, they cannot avoid or ignore 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 litigators 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 litigators fail to act in their client's best interests. They may also be breaching other regulatory principles.