Litigation: toeing the line

Michael Stacey and John Gould consider the pressures on litigators when balancing their duty to clients with their duty to the Court

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It's not always easy for litigators to balance competing professional duties. The client may have a lot at stake and the litigator's commitment to the client's interest, the adrenalized rush towards the goal of victory and the pressure of timetables and documents may leave little space for detached reflection. Sometimes what is impermissible is clear, even if it seems to be in the client's best interest, but sometimes important decisions at the margin of propriety must be made quickly.

The principles are clear enough. Solicitors are servants of the court in priority to being representatives of their clients. It is no defence that the client's interests required a lack of integrity or a dereliction of the lawyer's duty to the court or the administration of justice itself. Clients must be served within the boundaries of professional conduct not by overstepping them.

Many infractions may go undetected, that is often the case when a position of trust is abused, but where things unravel the consequences may be very severe. The temptation is to play poker and keep raising the stakes in the hope of avoiding the reckoning. Usually that makes things much worse and when the house of cards concealing the wrongdoing collapses, it is the cover-up which brings the lawyer down.

Three areas of litigator's work seem to represent a particular risk. Two relate to the manipulation of the evidence which a court will come to consider; the third is using proceedings which are without merit to obtain some collateral advantage for the client.

WITNESS STATEMENTS

The more that is at stake the greater the pressure on the lawyer. The Hillsborough disaster was the deadliest in British sporting history with a total of 97 fatalities and 766 injuries. Those whose failings caused so many deaths had the strongest of interests in avoiding blame. The Hillsborough Independent Panel appointed by the government concluded that 116 witness statements had been altered to remove or change negative comments about South Yorkshire Police. One of the solicitors involved was cleared of attempting to pervert the course of justice in 2021. The SRA confirmed in 2022 that it was continuing to investigate the role of solicitors in the proceedings following the disaster.

Solicitors must be careful that the statement they prepare properly records the witness's own evidence. The temptation to prompt, coach or express the thoughts the solicitor thinks the witness ought to have thought may well lead to professional trouble.

The High Court has sought to address this risk through Practice Direction 57AC, which requires trial witness statements in the Business and Property Courts to include certificates of compliance by the witness and the lawyer for the relevant party. Witnesses are required to confirm (i) their understanding that it is not their function to argue the case, either generally or on particular points, or to take the court through the documents in the case; and (ii) that the witness statement sets out only their personal knowledge and recollection, in their own words.

DISCLOSURE

A failure to disclose material documents of which the solicitor is aware because they are too damaging to the client is also likely to have the most serious consequences. There has been much public criticism of the conduct of the lawyers acting for the Post Office in the Horizon Scandal for not disclosing documents evidencing that the computer system was unreliable. Perhaps the proper approach was always clear to them and they chose to ignore it, but often judgments in relation to relevance and proportionality are more nuanced. The lawyer must bear in mind, however, that they may be called to account under a bright light of very detailed scrutiny years later because the result of their alleged failings is so serious. Sometimes the consequences of a failure may be far greater than marginal financial differences to commercial organisations of getting it right in the first place.

UNMERITORIOUS CASES

The third area of risk relates to unmeritorious cases. Although a small element of legal practice, so-called Strategic Law Suits Against Public Participation, or SLAPPS, have received a great deal of political and regulatory attention. The basic idea is that allegations against the rich and powerful are suppressed by taking unwarranted legal action against journalists and whistle blowers who can't afford to fight. The idea is to intimidate into silence not to pursue a legitimate claim. In a relatively small number of cases this is seriously against the public interest, but pressure through proceedings is the litigator's stock in trade and most parties to litigation feel pressure. The boundary of what is proper is drawn depending not on the strength of the claimant but rather the weakness and vulnerability of the defendant, whether they have access to proper

representation and most important the strength of the claimant's case.

It is not only in SLAPPS that unmeritorious cases are used for collateral purposes. Lawyers are not entitled to manipulate or abuse the court system even where to do so would benefit their clients. In R (Hamid) v Secretary of State for the Home Department [2012] EWHC 3070 (Admin), for example, the court drew attention to the risk that legal advisers were deliberately delaying applications to prevent the removal of immigration overstayers so as to delay the actual removal of their clients from the UK. The court confirmed that professional misconduct could arise if an application were made with a view to postponing the implementation of a previous decision where there were no proper grounds for doing so. The court might respond by compelling personal attendance of the solicitor responsible with their Senior Partner to explain their conduct. Publishing their identity or a complaint to their regulator may also follow.

Preparing grounds of appeal indicating merit when there was no merit has also led to strong professional criticism by judges. If a case is totally without merit, it may not be necessary to show that a solicitor acted knowingly or recklessly. A repeated failure to consider whether a case is arguable may be sufficient to amount to misconduct.

DOING THE RIGHT THING

Interestingly most clients worth having don't want a dodgy lawyer who looks to win at all costs by doing whatever it takes. A good client wants to respect and trust their lawyer to do their best within the rules. A sensible client knows cheating by their lawyer actually puts the client's interests at risk rather than advancing them.

Solicitors playing fast and loose with their professional duties in litigation is a little like drunk driving. A person may get away with it, they may be caught or they may inflict real harm on others. If in doubt, the best advice is err on the side of caution and consult senior colleagues. Client dissatisfaction is ephemeral, career ending misconduct is not.

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