



REGULATION FOR LITIGATORS

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There was a time when a litigator's duty to act in the best interests of their client was regarded as paramount, subject of course to the duty not to mislead the court. Today things are quite different. The duty to act in the best interests of a client is now demoted to number 7 - bottom of the list of the SRA Principles 2019. At number 1 is the duty to act "in a way that upholds the constitutional principles of the rule of law and the proper administration of justice".

This change of emphasis corresponds with the SRA's move to ethical and principles-based regulation as opposed to a rules-based regime. The rules applicable to litigators begin with the SRA Principles, the most important being Principle 1, as referred to above. If our duty to act in the best interests of our client conflicts with our duty to the court then the duty to the court would take precedence. For example,

if a client wished to conceal certain incriminating documents from disclosure, the solicitor should advise the client of their obligations to the court and if the client refused to comply then the solicitor would have no option other than to cease acting.

The duty not to mislead the court is now included within Rule 1.4 (Code for Individuals & Code for Firms) and is no longer part of the specific section of the Code relevant to litigation. Rule 1.4 is a more general rule prohibiting misleading clients, the courts, or others "either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client)". The duty not to allow others to mislead is very wide-ranging and contrary to the original judgment of Lord Diplock in *Saif Ali v Sydney Mitchell* [1980] AC 198 in which he stated that an advocate could passively stand by as long as he did not actively mislead the court.

The specific section of the Code for Individuals that relates to litigation is at Section 2 and is headed "Dispute resolution and proceedings before courts,

tribunals and inquiries". Exactly the same rules apply within the Code for Firms. There are seven rules within this section, most of which have applied previously in the same or similar guise. At Rule 2.4 you are required "to only make assertions or put forward submissions to the court or others which you know to be properly arguable". Do beware of any novel or even specious arguments that your client has dreamt up in the bath and which they want you to run up the flagpole. Also note that the duty is not just limited to making assertions to the court but also extends to making statements to "others", care is needed if making elaborate, but ultimately unarguable, statements to the opposing lawyer at the outset of litigation. There is an obvious tension here between balancing your duty to the client to pursue all avenues on their behalf with the duty imposed by Rule 2.4.

The well-known case of *Brett v SRA* [2014] EWHC 2974 (Admin) further

demonstrates the duties of a litigator. Mr Brett was the in-house lawyer for The Times newspaper group and was defending an application for an injunction. He knew that a Times journalist had obtained information about the identity of a policeman blogger by hacking an email account.

Nonetheless, he allowed the journalist to submit a statement which suggested that the journalist had only obtained the information through legitimate means. He compounded this by failing to instruct Leading Counsel for The Times that the hacking had taken place. Mr Brett did nothing to correct the incorrect information and, in doing so, misled the court and the opposing lawyers. He explained that he had a dilemma between his duty to the court and his undertaking to the journalist not to disclose confidential information. Mr Brett was suspended by the SDT for 6 months but then appealed to the Administrative Court which allowed his appeal in part by substituting "knowingly" for "recklessly" in relation

to the allegation of misleading the court.

Other areas of particular risk are without notice applications where there is a duty to ensure that there is full and frank disclosure to the court. Disclosure is another potential pitfall, especially with an uncooperative client. You should also remember that you have a continuing obligation to the court. If you have inadvertently misled the court you must correct the mistake. That obligation not to mislead the court continues for the duration of the case.

The SRA Risk Outlook paper on balancing duties in litigation is worth mentioning as it highlights specific concerns such as predatory or aggressive litigation which it considers might constitute a breach of the rules.

And finally, bear in mind that litigation is the only practice area which is subject to a statutory obligation under the Legal Services Act 2007. At Section 1 (3) (d) as one of the five statutory professional principles, litigators are required to "comply with their duty to the court to act with independence in the interests of justice".

The SDT emphasised the duty of independence in *SRA v Paul Simms* 2020 "A solicitor is independent of his client and having regard to his wider responsibilities and the need to maintain the profession's reputation, must and should on occasion be prepared to say to the client "what you seek to do may be legal but I am not prepared to help you do it"

The difficulties for litigators of balancing duties to the court and to the client should not be underestimated. A culture within litigation departments of discussing and sharing such practical experiences is recommended so as to avoid the unwarranted interest of our regulator.

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