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REGULATING LAWYERS ON CLIENT OR CASE ACCEPTANCE

The case of strategic lawsuits against public participation (SLAPPs)

Andrew Boon

Abstract

In liberal states, the legal role involves maintaining a balance between representing the interests of clients and observing duties to legality, whether expressed as duties to the rule of law or the administration of justice. Thus, lawyers must not advise clients on how to break the law nor assist them in doing so. Additionally, they are sometimes called on to discriminate against potential clients whose interests they consider conflict with the public interest. The problems and possibilities of an approach requiring lawyers to refuse clients' legal objectives is examined using the example of strategic lawsuits against public participation (SLAPPs). Analysis of the response to such cases in England and Wales suggests that lawyers' individual discretion in accepting clients should be exercised within a framework of clear regulation rather than as a matter of personal moral conscience.

I Introduction

Historically, lawyers in common law jurisdictions were encouraged to see accepting clients, and being neutral about them or their goals, as a public good, a necessary consequence of supporting the rule of law.¹ As in other liberal societies, lawyers accommodated dedication to represent client interests against obligations to legality. This traditional orientation to support the public good is under increased scrutiny across jurisdictions as a result of various scandals, usually involving litigation.

1 Andrew Boon, *Lawyers and the Rule of Law* (Hart Publishing 2022) chs 12 and 13.

In England and Wales, an area receiving considerable attention, including from legal professional regulators, is strategic lawsuits against public participation (SLAPPs), in which civil proceedings are used to suppress allegations of impropriety. This attention was prompted by defamation cases launched by Russian oligarchs, allegedly to suppress journalistic investigations.² Abuse of process, however, takes many other forms, raising the question of whether the singling out of SLAPPs for distinctive forms of control is justified. It is a question engaging fundamental issues of the alleged abuser's rights, such as the right to privacy. It also involves their opponent's right to impart information and ideas without interference.³ The public interest is similarly engaged, particularly the interest in exposing crime and corruption, weighed against a person's right to seek justice.

One of the possibilities for controlling SLAPPs is to deter lawyers from representing those clients seeking to deter or silence critics of their actions. One of the main regulators of lawyers threatens to discipline those bringing a case it deems to be a SLAPP. Another suggests that the decision is better made by courts, rather than lawyers in their offices. These reactions reflect ambivalence about a situation of considerable ambiguity. What are the arguments for conduct regulation requiring lawyers to reject clients in the public interest? What is the potential for framing appropriate rules? What are the implications of regulation for the social role of lawyers?

II Context

1 The legal role

In England and Wales the development of the adversarial system in the 18th and 19th centuries gave a strong client focus to the lawyer's role. Towards the end of that period, barristers demanded that they were not identified with their clients, claiming that the right to representation was a fundamental right.⁴ In the 19th century, commitment to the public interest, expressed as a duty to the court, was superimposed on the obligation to diligently seek the objectives of clients. This was only one of the ways lawyers were constrained by legality.

Where a client sought assistance to break the law, their lawyer was bound to counsel them against committing illicit acts and not to assist them in any

2 Andrew Boon, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing 2023) 216–219.

3 See European Convention on Human Rights, arts 8 and 10 and, for examples of cases, see Goldsmith, Chapter 11, this volume.

4 The so-called cab rank rule, which imposes an obligation to accept cases on barristers, is usually dated to the trial of Tom Paine in 1792, although it almost certainly existed before (see Boon [n 1] 271, 301–302).

way. But they were not obliged to report them if they decided to continue without the lawyer's help. The rationale for this approach was that a lawyer might dissuade a client from illegality but would be in no position to do so if they were not in possession of all the facts.⁵ And lawyers were not likely to be put in possession of all the facts if clients feared they might report them to the authorities. The state therefore guaranteed, through recognition of clients' legal professional privilege (LPP), that lawyers would not ordinarily be required by courts to disclose client secrets.⁶ The exception was where clients deliberately involved lawyers in illegal schemes, or created an impression that their lawyer was involved, in which case the veil of secrecy might be lifted.

2 *Pressure to adapt the legal role*

Around the millennium, inroads were made into the traditional view on confidentiality. Various countries introduced legislation designed to tackle money-laundering and terrorism, both of which were regarded as sufficient threats to national interests and security to justify limited abrogation of clients' LPP. Even so, LPP was preserved for lawyers dealing with clients involved in different offences. This illustrates that, in the United Kingdom at least, measures designed to deal with threats to the public interest, forcing lawyers to betray clients, required statutory interventions. This context is important in understanding why discussions of gatekeeping roles typically involve lawyers not acting, rather than lawyers reporting their clients to relevant authorities.

The client-centred ethic of lawyers was always controversial. There was heated interest in the conduct of barristers around the 1830s, when criminal defendants in serious cases were formally allowed to have representation in court. Pue noted that public outcry, orchestrated by politicians and the press, had features of moral panic. It nevertheless led to reform and constraints on advocacy that endure to the present. The current controversy is arguably a similar watershed. In addition to political pressure, press campaigns may be fuelled by hostility to privacy laws inimical to 'press freedom'. This is not to say that the issue of abusive litigation is not serious or that it should not be addressed. It is simply to say that the issues raised demand serious reflection and proportionate action.

III Regulation

The principal legal profession in England and Wales evolved as two branches, in addition to barristers, who conducted advocacy, solicitors prepared cases, and

⁵ Boon (n 1) 193–204.

⁶ Ibid.

dealt with most non-contentious business. In 2007, professional self-regulation was ended by the Legal Services Act 2007, which forced the legal professions, the solicitors, represented by the Law Society, and the barristers, represented by the Bar Council, to establish ‘independent’ regulators. These were known as the Solicitors Regulation Authority (SRA) and Bar Standards Board (BSB). They were, however, under direction of a government agency, the Legal Services Board, a situation that has made them potentially susceptible to government influence.

Strategic lawsuits against public participation, often defamation claims against journalists, primarily intended to prevent publication of incriminating information, became a pressing issue only in 2022. A defining feature of the abuse they represent is that the intention of the claimant is not to vindicate rights, but to use the fact that a case is pending to suppress debate. Such a case arose in 2021, when a journalist called Catherine Belton faced three alleged SLAPP claims brought by Russian oligarchs over her book *Putin’s People*. These cases were settled in December 2021, just before Russia invaded Ukraine. This event hugely increased the political salience of SLAPPs in the British Parliament.

The context for the British government’s attention was the Russian invasion of Ukraine in 2022 and action against over a thousand Russians based in the United Kingdom.⁷ The prime minister warned there would be a ‘price to pay’ by English lawyers undermining British interests by representing Russians, and several firms cut ties with Russian clients.⁸ The Law Society, the representative body of solicitors, decried the invasion but defended the right of lawyers to represent clients.⁹ The Law Society president argued that solicitors’ obligation to uphold the rule of law required them to represent clients, before the courts, ‘whoever they may be’ to ensure that the executive did not overreach its powers.

The Bar Council, the representative body for barristers, warned the government that difficulty defining and controlling SLAPPs might have a chilling effect on legitimate litigation. It suggested that the task of controlling SLAPPs, as with other abusive litigation, should be left to the courts.

7 Rupert Neate, ‘UK Sanctions Now Cover £18bn of Russian-Owned Assets’ *The Guardian* (10 November 2022) <www.theguardian.com/world/2022/nov/10/uk-sanctions-18bn-russian-owned-assets-ukraine>. All of the sources cited in this chapter were accessed in October 2025, unless otherwise indicated.

8 Kate Beioley, ‘Lawyers Cut Ties with Kremlin-Linked Clients as Reputational Risks Mount’ *Financial Times* (5 March 2022) <www.ft.com/content/5ca32b8c-7e29-4a91-8854-0660e5a2891e>.

9 Neil Rose, ‘PM Issues Warning to Oligarch Lawyers as Profession Hits Back at Criticism’ *Legal Futures* (3 March 2022) <www.legalfutures.co.uk/latest-news/pm-issues-warning-to-oligarch-lawyers-as-profession-hits-back-at-criticism>.

The SRA, the regulator of solicitors, reacted swiftly to the government's call to regulate, warning that there would be disciplinary charges brought when solicitors supported SLAPPs. This is, however, only one of several regulatory possibilities and is contrary to the approach of the barristers' regulator. The best way forward should, arguably, be consistent with existing regulation and proportionate to the issue.

IV Regulatory possibilities

The US academic David Wilkins proposed four possibilities for regulating lawyers: liability controls, for example, negligence claims; forum controls operated by an institution in the relevant practice forum area, for example, a court; legislative controls, for example, those operated by administrative agencies; disciplinary controls, for example those operated by disciplinary tribunals, perhaps under the supervision of the courts.¹⁰ The use of each to control SLAPPs is now considered in context.

1 Liability

Historically, lawyers in England and Wales were not responsible for their role in bringing or conducting litigation. An action for abuse of process might lie against their client, but not directly against their lawyers, unless they acted unreasonably in bringing an action. A rare instance arose following a case arising from libel proceedings in which Count Tolstoy interceded as co-defendant but was ordered to pay substantial damages. A challenge to the decision, launched four years later and alleging fraud in the original case, was struck out having been found to be 'utterly hopeless'.¹¹

An appeal against the decision in the second action also failed. It was described by Rose LJ as a 'collateral attack on the decision of a court of competent jurisdiction' and therefore an abuse of process.¹² This was not on the grounds that the lawyers had acted without a fee, but because of the general circumstances, including their decisions not to seek legal aid when their client was bankrupt, and launching proceedings without a letter before action. In the view of the judge, they had 'lived with the case and more particularly Count Tolstoy's enthusiasm for his point of view for so long that they were unable to take an objective view'.¹³

10 David Wilkins, 'Who Should Regulate Lawyers' (1992) 105 Harvard Law Review 799.

11 *Tolstoy-Miloslavsky v Aldington* [1996] 1 WLR 736 [740] (L.J. Rose, summarizing the first instant finding).

12 Ibid 747, 750.

13 Ibid 750.

In 2018, the Supreme Court recognized a new tort of malicious prosecution of civil proceedings.¹⁴ This potentially broadened the choice of remedy for aggrieved defendants' against claimants abusing the litigation process. In order to succeed, parties had to prove five elements, including that a suit brought against them by a malicious claimant had been decided in their favour and that they had suffered damage as a result. The damage might include solicitor and client costs, those outside the party and party costs usually recovered by the winner in litigation.

The majority of the judges in the Supreme Court focused on malice as the key element of the new tort. It was suggested it might be inferred from the absence of reasonable cause or from lack of evidence supporting the original action. Nevertheless, proving malice was acknowledged to be a basic problem. If litigants declined to waive their right to legal professional privilege over communications with their lawyer concerning the original litigation, it would be difficult to prove malice.

The problem of proving malice without access to privileged documents was one of the reasons the minority of four judges of the Supreme Court sought to avoid creating a new right of action. It recognized an individual's absolute right of privilege could not simply be overridden for a supposedly higher public interest. Nor could courts create exceptions to LPP, which could only be abrogated by the clearest words of statute. Indeed, it was 'a fundamental condition on which the administration of justice' rested. This difficulty reduced the utility and value of the new tort, making revision and reconstitution as a new remedy for abuse of process desirable.¹⁵ So far this has not happened.

2 *Forum controls*

Common law courts allowed significant control of process to advocates, but judges demanded high standards of responsibility in return. Breaches of these expectations of propriety were reflected in rules of conduct for litigators and advocates. While none directly addressed the issue of unjustified or abusive litigation, some, particularly those for barristers, had a bearing on it. In addition to specific expectations of propriety, courts had jurisdiction to punish the mishandling of litigation by making costs orders against lawyers causing a party to incur costs through an 'improper, unreasonable or negligent act or omission'.¹⁶ The CPR 1999 consolidated courts' ability to sanction lawyers by making wasted costs orders.¹⁷

14 [2016] UKSC 43, [2018] AC 779, on appeal from [2015] EWHC 1315 (Ch).

15 Rachael Mulheron, 'The Tort of Malicious Prosecution of Civil Proceedings: A Critique and a Proposal' (2022) 42(3) *Legal Studies* 470.

16 Senior Courts Act (1981) s51.

17 See particularly CPR 46.8.

A contentious aspect of the wasted costs jurisdiction related to lawyers presenting so-called ‘hopeless cases’. Courts were reluctant to penalize lawyers where a case failed. The reasons appeared to reflect a desire not to inhibit willingness to litigate and recognition that lawyers may be obligated to represent clients even after they had advised against continuing an action. Therefore, inclination to punish lawyers by making wasted costs orders against them was reserved for extreme examples of ‘hopeless cases’ involving impropriety, unreasonableness, or negligence. There was also a judicial discretion not to make a costs order, even where the criteria were met. This discretion was broad since the circumstances in which an order could be made were ‘infinitely varied’.¹⁸

In *Tolstoy v Aldington*, even the fact that Lord Tolstoy’s case was hopeless may not have been sufficient reason to make a wasted costs order against his lawyers. But, as Ward LJ said of the second action, ‘As hopeless cases go, this really was plumbing the depths’.¹⁹ It was also ‘clearly vexatious’.²⁰ An order for wasted costs against the lawyers was justified because ‘the solicitors allowed themselves to be dragged outside that broad province where their actions could reasonably be said to further the ends of justice’.²¹

Defamation or other litigation commenced with no evidential basis, but with intent to gag journalists or other critics, meets the criteria for either of the abuse of process torts. In both, there appears to be scope to sanction lawyers bringing false claims for costs. An order for lawyers to pay wasted costs can also be made in such litigation. Finally, while there are few examples, cases identifiable as SLAPPs have been struck out by UK courts.²² The availability of these various remedies makes the legislative mechanism for dealing with SLAPPs of particular interest.

3 Legislation

The Economic Crime and Transparency Act (2023) provided for the striking out of SLAPP claims only when a possible SLAPP restrained the defendant’s exercise of the right to freedom of speech in disclosing economic crime.²³ The Act did not therefore deal with SLAPPs aimed at suppressing corruption without an economic dimension. Moreover, the mechanism for striking out

18 *Rainer Hughes Solicitors v Liverpool Victoria Insurance Company Ltd & Ors (Rev1)* [2024] EWHC 585 (KB) [35].

19 *Tolstoy-Miloslavsky v Aldington* [1996] 1 WLR 736 [752] (L.J. Ward).

20 *Ibid.*

21 *Ibid.*

22 Samuel Rowe, ‘A SLAPP Struck Out: NI Court Finds Proceedings are Abuse of Process’ *5RB Media and Communications Law* (7 February 2024) <www.5rb.com/news/a-slapp-struck-out-ni-court-finds-proceedings-are-abuse-of-process/>.

23 See s195 (1)(b) and (c). For the full section see Goldsmith, Chapter 11, this volume.

was to be included in amendment of the Civil Procedure Rules and left to the courts. The Act required that these rules provide that claims could be struck out before trial where the court determined:

- (a) that the claim is a SLAPP claim, and
- (b) that the claimant has failed to show that it is more likely than not that the claim would succeed at trial.²⁴

The Act, therefore, did not prevent the initiation of SLAPPs, but it provided a mechanism for courts to consider striking them out.

In February 2024 the former government offered support to a private members bill seeking to extend the Economic Crime and Corporate Transparency Act 2023 to protect defendants experiencing harm or inconvenience from possible SLAPPs beyond that ‘ordinarily encountered in the course of properly conducted litigation’.²⁵ Concern was expressed that this might move intimidatory tactics to the pre-litigation phase.²⁶ The proposed legislation fell with the June 2024 election. The new minister hoped that regulators could hold law firms to account and tackle poor conduct²⁷ but noted a need to strike a balance between ‘access to justice and the right to free speech’.²⁸ The minister warned of the risk of ‘unintended consequences’ from extending SLAPPs to non-economic activity and advocated testing the implementation of the new Civil Procedure Rules on early dismissal of ‘economic’ SLAPPs.²⁹

4 Discipline

Historically, anti-SLAPP regulation need only have been directed at solicitors. Barristers could only be instructed by solicitors and were then bound by the ‘cab rank rule’ to appear as advocates. Solicitors, therefore, acted as a filter for cases presented by barristers as advocates. Today, however, regulatory control of SLAPPs by disciplinary means potentially involves solicitors and barristers. This is because both can now be primary contact points for clients. In theory,

24 Economic Crime and Transparency Act (2023) s194(1).

25 Neil Rose, ‘MPs Hit Out at Media Lawyers’ Lobbying Over SLAPPs Bill’ *Legal Futures* (9 May 2024) <www.legalfutures.co.uk/latest-news/mps-hit-out-at-media-lawyers-lobbying-over-slapps-bill>.

26 Ibid.

27 Ibid.

28 Neil Rose, ‘SRA “Needs More Fining Powers” to Tackle Lawyers Behind SLAPPs’ *Legal Futures* (22 November 2024) <www.legalfutures.co.uk/latest-news/sra-needs-more-fining-powers-to-tackle-lawyers-behind-slapps>.

29 CPR Part 3.4. See also, Gov UK, ‘Policy Paper’ *Fact Sheet: Strategic Law Suits Against Public Participation* <www.gov.uk/government/publications/economic-crime-and-corporate-transparency-act-2023-factsheets>.

therefore, clients intent on pursuing a SLAPP could seek a lawyer with the most SLAPP friendly regulation, on the face of it, currently the barrister. This section therefore considers the regulatory position of, first, solicitors and then barristers.

a Solicitors

After the SRA became the regulator for solicitors it adopted a version of Principles-based Regulation, a method advocating that regulators adopt broad statements of Principle rather than detailed rules.³⁰ The Principles adopted by the SRA as a prelude to its Code of Conduct, currently require that solicitors act

- in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice
- in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorized persons
- with independence
- with honesty
- with integrity
- in a way that encourages equality, diversity, and inclusion
- in the best interests of each client.

The SRA issued a new Code of Conduct in 2011. This largely adopted material from the previous solicitors' code of conduct but with considerable reduction in detail. The implicit downgrading of detailed conduct rules had some advantages, for example, allowing flexibility in achieving outcomes. But Principles were also used as a basis of disciplinary charges. Given the possibility of appeal from the Solicitors Disciplinary Tribunal to the courts, relying on Principles rather than rules as a basis for disciplinary cases was potentially flawed. A fundamental premise of English law, and rule of law based regimes generally, was that offences should be clearly defined in statute or regulation, not defined *post facto* by prosecutors.

Common law courts' historical hostility to regulatory charges that were imprecise³¹ was manifest in *Beckwith v SRA* (2020).³² The SDT had sanctioned a solicitor for sexual assault against a colleague. The appeal court refused to uphold the sanction. Part of its reasoning was that a charge

30 Andrew Boon, 'Professionalism Under the Legal Services Act 2007' (2011) 17(3) International Journal of the Legal Profession 195.

31 *Entick v Carrington* [1765] EWHC J98 (KB) (1765) 19 Howell's State Trials 102.

32 *Beckwith v SRA* [2020] EWHC 3231 (Admin).

based on undermining public trust in the solicitors' profession and acting with integrity was not sustainable on the facts of the case. Indeed, it suggested that charges based on Principles should be supported by rules of conduct.

In the current SRA Code of Conduct the full extent of solicitors' responsibilities in dispute resolution and proceedings before courts, tribunals, and inquiries was outlined in seven short sentences, as follows:

- 2.1. You do not misuse or tamper with evidence or attempt to do so.
- 2.2. You do not seek to influence the substance of evidence, including generating false evidence or persuading witnesses to change their evidence.
- 2.3. You do not provide or offer to provide any benefit to witnesses dependent upon the nature of their evidence or the outcome of the case.
- 2.4. You only make assertions or put forward statements, representations or submissions to the court or others which are properly arguable.
- 2.5. You do not place yourself in contempt of court, and you comply with court orders which place obligations on you.
- 2.6. You do not waste the court's time.
- 2.7. You draw the court's attention to relevant cases and statutory provisions, or procedural irregularities of which you are aware, and which are likely to have a material effect on the outcome of the proceedings.

None of these provisions is expressly related to bringing claims that the primary purpose of was not to seek a legal judgment. Although 2.4 and 2.6 might be said to be relevant, it would extend conventional contexts in which those rules were thought to apply.

In addition to the section of litigation, the SRA Code of Conduct contained two provisions that may protect third parties:

- Standard 1.2: You do not abuse your position by taking unfair advantage of clients or others.
- Standard 1.4. You do not mislead or attempt to mislead your clients, the court or others, either by your own acts or omissions or allowing or being complicit in the acts or omissions of others (including your client).

Historically, the application of 1.2 to 'others' has been narrow, e.g. when privileged documents are disclosed by mistake. Standard 1.4 covers all misleading, but the duty not to mislead the court has a substantial jurisprudence not captured in the formulation. The scope of the obligation not to mislead others, for example, is less clear.

In response to pressure to regulate SLAPPs, the SRA did not amend its code of conduct to address the issue. Rather, it published two warning notices, with online guidance, informing solicitors that they risked misconduct charges. These notices covered, first, the conduct of disputes generally and, second, being implicated in actions the SRA deemed to be SLAPPs (defamation actions the aim of which was to silence critics like whistleblowers, journalists, and academics). Both could lead to disciplinary action even when actions were only obliquely covered in the code of conduct.

The SRA's warning notice on the SLAPPs, issued in May 2022 and updated in November 2024,³³ outlined 'key messages for solicitors and law firms' as follows:

- you must not bring or threaten unmeritorious claims or engage in tactics that are intimidatory or otherwise oppressive
- your duty to act in your client's interest must be balanced with your wider professional obligations, including your duty to the courts and to uphold the rule of law, which take precedence should these come into conflict
- you should identify proposed causes of action or behaviours which comprise a SLAPP or abuse of the litigation process, and decline to act in this way
- particular care is required where a publication ventilates a matter that is likely to engage the public interest.

The warning notice invoked a number of its Principles:

- 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.

It also identified rules which it claimed could apply:

- 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

33 SRA, 'Strategic Lawsuits Against Public Participation (SLAPPs)' SRA (31 May 2024) <www.sra.org.uk/solicitors/guidance/slapps-warning-notice/>.

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)
- paragraph 3 of the code requires you to maintain your competence to carry out your role, provide a competent service to clients and keep your professional knowledge and skills up to date.

The sheer volume of provisions invoked to justify the warning notice highlighted a core problem: abusive litigation was not addressed in the rules.

The warning notice went on to clarify the SRA's expectations of what it called the 'competency of solicitors instructed to undertake defamation or privacy work' 'to identify proposed causes of action (including pre-action) that could be defined as SLAPPs, or are otherwise abusive, and decline to act in this way'. It then drew a parallel with a solicitor facilitating suspicious or bogus investment schemes and transactions, the case of Paul Francis Simms³⁴ in which the tribunal stated,

In cases of professional misconduct, the behaviour of a solicitor is not only to be considered in the context of the legality or otherwise of the subject matter of the advice and assistance given. The profession has a reputation to defend and maintain.

The SRA also cited the recent case of *Haddad v Rostamani & Ors*³⁵ but acknowledged the limited duty it found solicitors owed 'the court or another party to the case any duty to investigate the facts, or to ascertain the truth, before advancing the factual case on behalf of their client'.

Given the content of its warning notice, the SRA's confidence that it had the regulatory tools and competence to deal with SLAPPs may seem misplaced. These materials failed to identify an obviously relevant rule to prevent lawyers taking on all but the most obvious abusive cases. It appears likely that disciplining solicitors for advancing defamation or other cases that may subsequently be deemed to be SLAPPs would need the clearest evidence in order to

34 Paul Francis Simms (para 56, *Simms v Law Society* [2005] EWHC408 (admin)).

35 *Haddad v Rostamani & Ors* [2024] EWHC 448 (Ch).

satisfy the courts. This would be evidence of (a) the lack of arguable case and/or (b) evidence of the claimant's abusive motive. In the first two prosecutions in so-called SLAPP cases, this proved to be the case.

In the first anti-SLAPP case, a fine imposed by the Solicitors Disciplinary Tribunal (SDT) was overturned on the grounds that the reasons were 'opaque' and, hence, 'was replete with risk of unfairness to Mr Hurst and to the reaching of an unfair decision'.³⁶ The Respondent had sent a 'without prejudice' letter, allegedly seeking to prevent publication of information about his client by an investigative journalist. The judge said,

This idea of a preoccupation with secrecy and stifling a right to publish – proposed by the SRA and adopted by the tribunal – was, in my judgment, insufficiently examined, accounted for, or evidentially supported in the tribunal's analysis, and as such was replete with risk of unfairness to Mr Hurst and to the reaching of an unfair decision.

The SRA were subsequently ordered to pay substantial costs, which is extremely unusual in failed prosecutions.³⁷

Another such case which had been billed as anti-SLAPP was summarily dismissed by the SDT on the grounds that it was 'legally flawed and unsupported by evidence', with costs again being awarded against the SRA on the grounds of the 'disproportionate prejudice to the respondent [and] a substantial personal and professional impact'.³⁸ These decisions may suggest, at the least, that the SRA's determination to regulate was ill-advised. It was in sharp contrast to the attitude of the Bar Standards Board (BSB), which regulated barristers.

b Barristers

The BSB became the regulator of barristers at the same time as the SRA became regulator for solicitors. In 2014 it issued a new Code of Conduct, accompanied by Core Duties expressed in very similar terms to the Principles described for solicitors. The rules of conduct in the new code were similar, and

36 B. Castro, 'Zahawi Solicitor Overturns SDT's Conviction Over "without Prejudice" Email' *The Law Society Gazette* (20 January 2026) <www.lawgazette.co.uk/news/zahawi-solicitor-overturns-sdts-conviction-over-without-prejudice-email/5125635.article> accessed 24 February 2026.

37 M. Cross, 'New Blow to SRA as Solicitor Cleared of 'SLAPP' Behaviour Awarded Costs' *The Law Society Gazette* (13 February 2026) <www.lawgazette.co.uk/news/new-blow-to-sra-as-solicitor-cleared-of-slapp-behaviour-awarded-costs/5125886.article> accessed 20 February 2026.

38 B. Castro, 'SRA Must Pay Carter-Ruck Partner Costs in Failed 'SLAPP' Case' *Law Society Gazette* (2 February 2026) <www.lawgazette.co.uk/news/sra-must-pay-carter-ruck-partner-costs-in-failed-slapp-case/5125778.article> accessed 20 February 2026.

in some cases identical, to those in the preceding codes. These were filled with rules maintaining the balance between duties to clients and to the administration of justice.

In the current BSB Code of Conduct, adjacent rules provide that barristers' obligation to act in the best interests of each client is subject to their duty to the court³⁹ but that this does not require them to breach their duty of confidentiality to clients.⁴⁰ Possibly the prime among these obligations currently is rule C3.1, which provides that 'you must not knowingly or recklessly mislead or attempt to mislead the court'. This has been applied particularly to presentation of false evidence, including testimony.

The barrister's duty not to mislead the court was specified to include obligations not to:

- (a) make submissions, representations or any other statement; or
- (b) ask questions which suggest facts to witnesses which the barrister knows, or is instructed, are untrue or misleading.⁴¹ Related rules covered not making false allegations. Rule C9 specified that the barrister's duties of honesty and integrity include the following requirements:
 - 1 you must not knowingly or recklessly mislead or attempt to mislead anyone;
 - 2 you must not draft any statement of case, witness statement, affidavit or other document containing:
 - a any statement of fact or contention which is not supported by your *client* or by your *instructions*;
 - b any contention which you do not consider to be properly arguable;
 - c any allegation of fraud, unless you have clear instructions to allege fraud and you have reasonably credible material which establishes an arguable case of fraud;
 - d (in the case of a witness statement or affidavit) any statement of fact other than the evidence which you reasonably believe the witness would give if the witness were giving evidence orally.⁴²

39 BSB Code of Conduct rC3.

40 Ibid rC4.

41 Ibid rC6.

42 Ibid rC9.

These obligations could arguably apply to being involved in the presentation of SLAPPs, but, as the handling of barristers facing wasted costs orders by judges suggests, only the clearest kind of hopeless case is likely to reach the threshold of not being ‘properly arguable’ referred to in rC9(2)(b). Tellingly, rC21, sets out ten situations in which barristers must not accept instructions, none of which relate to the prospects of success of the claim.

In 2023, Mark Neale, the director of the Bar Standards Board, considered the SLAPPs controversy.⁴³ He noted that barristers instructed in a case that was ‘obviously unarguable either legally or factually’ might have their overriding duty to the court to act with independence in the interests of the administration of justice engaged, together with the Core Duties of acting with honesty and integrity. He questioned, however, ‘whether barristers can or should substitute their ethical judgement when instructed to represent someone with a properly arguable case in law’.⁴⁴ Their refusal, he argued, might involve the difficult task of evaluating motive and balancing the competing public interests involved, including the right to litigate. He said,

There is a growing body of opinion that lawyers should sometimes prioritise the wider public interest over the interest of clients. But this doctrine collides head-on with another important principle; namely, that of access to justice. One can sympathise with the argument that, for example, those who act illegally or unethically, or who seek to shut down legitimate criticism in the media are acting contrary to the public interest. But should lawyers make a judgment that some clients are beyond the ethical pale, and therefore should not be represented?⁴⁵

It seems unlikely, given the tone of this extract, that the BSB would seek to regulate SLAPPs.

5 *Moral activism and individual refusal to act*

Moral activism by individual lawyers was not one of Wilkins’ regulatory mechanisms, although peer pressure was certainly an early form of regulation at the bar. Encouragement to take individual action may be urged on lawyers by the press, academics, and others. The long-standing debate about lawyers’ representation of unsympathetic clients surged in the 1970s with restatements of

43 Mark Neale, ‘Ethics and Access: Striking the Right Balance: What is an Ethical Lawyer?’ *Bar Standards Board* (28 April 2023) <www.barstandardsboard.org.uk/resources/ethics-and-access-striking-the-right-balance.html>.

44 Ibid.

45 Ibid.

the justification of lawyers' roles⁴⁶ but recently reignited around contemporary concerns.

In the new wave of academic moralism, Richard Abel, recently advocated individual refusal to act as a response to environmental threats, inequality, and subversion of democracy, facilitated by lawyers, arguing that,

Lawyers have long claimed moral irresponsibility, declaring that as long as they conform to the rules of professional conduct, it is not they but their clients who are accountable for the ends they seek. But this moral impunity is a luxury lawyers can no longer afford. The price to society is too high.⁴⁷

Abel is not alone in advocating that lawyers simply refuse to represent the clients they disapprove of on moral grounds.⁴⁸ But he also advocates that they should refuse to act for clients who exacerbate the threats he identifies, refuse to join organizations who act for them, shame other lawyers who do, and join in campaigning for legislation to address the threats.

Even regulators may suggest that individual moral activism is a regulatory solution. The SRA warning notice on SLAPPs cited 2002 dicta of the Solicitors Disciplinary Tribunal in *Simms*, cited earlier, stating that solicitors '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 to do it'. The implication that disciplinary tribunals should judge the quality of lawyers' moral as opposed to legal decisions introduces an unpredictable and subjective element to the process.

V Evaluation

1 *Liability and wasted costs*

As presently constituted, court powers in relation to abusive actions are ill-suited to bringing about an early end to abusive claims. As judicial discussion of the torts concerning abuse of process shows, it may take a forensic examination of evidence to show that there is no arguable case and the intention of the claimant may be unknowable, even with access to lawyers' papers. Such access would probably be denied on grounds that the claimant's LPP would be infringed. Greater inclination to make wasted costs orders against lawyers in cases where claims are shown to be unarguable may be a deterrent.

46 Boon (n 1) 228–233.

47 Richard L. Abel, 'Are There Causes and Clients Lawyers Should Not Represent?' (2025) 27(2) *Legal Ethics* 99.

48 Steven Vaughan, 'Existential Ethics: Thinking Hard about Lawyer Responsibility for Clients' Environmental Harms' (2023) 76 *Current Legal Problems* 1.

It is, however, a remedy that must usually wait until late in the proceedings, too late to prevent the financial mischief caused by a SLAPP.

2 Legislation

The legislative solution adopted in the Economic Crime and Transparency Act 2023, a change to the rules of court, contains a mechanism for the early identification and striking out of SLAPPs. The solution adopted in the Act avoided the burden of regulating SLAPPs depending on lawyers operating as gatekeepers to the legal system. This approach was aligned with the view of the BSB chair:

If the wider public interest and private interests should be weighed anywhere, it should be in Court within a framework of law, not in the privacy of a barrister's chambers with the implied threat of regulatory action if the barrister chooses the 'wrong' option.⁴⁹

The CPR solution left scope for argument regarding the scope of alleged SLAPP actions and the intent of claimants, but it appeared the best way of maintaining the balance between weeding out abusive litigation and maintaining open access to justice.

Encouraging courts to proactively deal with abusive litigation avoided the problems, and retained the advantages, of having lawyers involved with litigation. It meant that lawyers would not need to divine the intention of litigants and decide whether a prospective claim was, in fact, a SLAPP, a process which would involve them examining a potentially wide range of evidence and giving privileged advice before telling a client they could not act. It also preserved the principle of representation, ensuring that prospective litigants have the benefit of legal advice. This might include advice that continuing a potential SLAPP claim would be risky, both financially and reputationally.

While the court solution may be the best option, there will remain problems. Under the CPR, a possible SLAPP will only be struck out if the claimant was unlikely to succeed at trial. This would still involve forensic investigation: the CPR rules 'determining the nature and extent of the evidence that may or must be considered', 'the extent to which evidence may or must be tested', or 'permitting or requiring the court to determine matters of fact by way of presumptions'⁵⁰ have the massive disadvantage that defendants could be bankrupted before the process is complete. Even were the CPR amendment to allow punitive costs on dismissal of SLAPPs, this may not deter the wealthy claimant.

⁴⁹ Earlier, Neale (n 43).

⁵⁰ Ibid s194(2).

3 *Discipline*

There are a number of concerns arising from the SRA's efforts to regulate SLAPPs. The first was a tendency to elide the lines between legality and morality, attempting to regulate in areas where legislators were reluctant to tread. The second was a propensity to claim that its existing rule book addressed a situation when it apparently did not. The third was the risk in changing that situation so that there are rules addressing the mischief, including deterring valid claims. The fourth was attaching new meanings to Principles and rules by issuing warning notices online. The fifth was the practice of basing disciplinary charges on broad Principles, which risked straining the credibility of regulatory reach.

Some of these problems might be addressed by a rule addressing the mischief in a way the current rules do not. This might be

you must not bring or threaten unmeritorious claims or engage in tactics that are intimidatory or otherwise oppressive particularly where publication concerns a matter likely to be in the public interest.⁵¹

A provision such as this could be accompanied by more detail unpacking the implications of the terminology and guidance on compliance. Before implementing such a rule there should arguably be a consultation about the possible impact on access to justice and how that might be reduced. It should also address the implications, if any, that such a rule would or should have on lawyers' responsibility to third parties in other situations. If with an adequate rule, regulators would need to ensure there was sufficient basis and evidence to prosecute lawyers bringing or threatening SLAPPs.

4 *Moral activism*

While there is apparently no ideal solution available in the current regulatory toolkit, there are also arguments against individual moral activism as a solution to dealing with possible SLAPPs. First, the ethical rationale for the liberal legal role is that cases should be litigated, rights vindicated, and interests represented before, and determined by, the law. Second, a decision to act gives well-intentioned lawyers an opportunity to dissuade clients from harmful conduct. This is a justification of the current regime on confidentiality and LPP, a regime that reinforces lawyers' contribution to the rule of law by assuming that they will 'do the right thing' when advising clients.⁵² Third, if well-intentioned lawyers withdraw from representation, only those with

51 This is based on the propositions in the 'summary of key points' in the SRA's warning notice.

52 Boon (n 1), 197–124, considering the workings of advice privilege.

malign intentions would be left, potentially exacerbating the harm their clients do. Fourth, undermining the principle of neutrality removes the protection of the cloak of nonaccountability from lawyers representing progressive causes and deserving but unpopular clients. Until, however, regulators implement a workable rule to discourage abusive litigation, it is arguable that lawyers should apply the test outlined in the previous section.

VI Conclusion

There are often pressures to make lawyers conform to a ‘common morality’ rather than the neutral and partisan role traditionally defined by obligations to the rule of law. Threats of disciplinary action may chill the inclination of lawyers to use the courts for legitimate purposes. This, then, is at the cost of promoting client autonomy, a vital dimension of the rule of law. Do we want this? If so, should the law requiring it be clear? In England and Wales, regulators of the legal sector have adopted different attitudes to the issue.

One of the regulators in England and Wales, the SRA, sought to regulate SLAPPs using a rule book which did not explicitly cover abuse of process generally. Requiring lawyers to be gatekeepers, informers on clients, or protectors of third-party rights requires a little more than a bit of tightening up. The scope of regulation and the form and content of the codes of conduct need thorough review in order to address this issue. As things stand, there is an argument that the SRA Code of Conduct should be more comprehensive, consistent, and specific, including guidance, so that new expectations of lawyers, and the scope of the rules embodying them, are clear.