Solicitors Regulation Authority

Strategic Lawsuits Against Public Participation - Thematic review

19 April 2024

Executive summary

Introduction

Solicitors play a crucial role in making sure that everyone can access legal advice and representation. This includes taking action to defend a client's privacy and reputation. However, whilst legal representation should be robust, fearless and thorough, it must not become abusive through the use of intimidatory or oppressive tactics.

All solicitors must act honestly, with integrity, in a way which upholds the constitutional principle of the rule of law and the proper administration of justice, and in a way that upholds public trust and confidence.

There are concerns that solicitors and law firms are pursuing, on behalf of their clients, a type of abusive litigation known as strategic lawsuits against public participation (SLAPPs).

SLAPPs can undermine freedom of expression, the rule of law and amount to a misuse of the legal system.

SLAPPs have risen to prominence following Russia's invasion of the Ukraine in 2022. The Economic Crime and Corporate Transparency Act 2023 included provision to stop the use of SLAPPs in areas relating to economic crime. A Private Members Bill on SLAPPs is currently being debated by Parliament.

Concerns have also been raised about the funding of reputation management cases and the instruction of public relations (PR) companies and private investigators (PIs) by law firms. Given the increased public and political attention on SLAPPs, and as a proactive regulator, we have taken action to address these concerns.

We have published guidance on conduct in disputes [https://contact.sra.org.uk/solicitors/guidance/conduct-disputes/] to clarify to firms and solicitors what their obligations are and how to comply with them. We published a warning notice [https://contact.sra.org.uk/solicitors/guidance/slapps-warning-notice/] on SLAPPs advising of the need to be vigilant against getting involved in any form of abusive litigation aimed at silencing legitimate criticism, and that doing so is against our rules.

We published a companion piece [https://contact.sra.org.uk/consumers/problems/fraud-dishonesty/legal-threats-solicitor/] for those on the receiving end of legal threats to understand what to report to us and how this should be done. We also carried out a thematic review on conduct in disputes [https://contact.sra.org.uk/sra/research-publications/conduct-disputes/] to understand the working practices of firms providing reputation management services and how they were dealing with the risks of abusive litigation.

During the thematic review on conduct in disputes, we found that not all heads of department and fee earners were aware of our associated/more general guidance on conduct in disputes and balancing duties in litigation [https://contact.sra.org.uk/sra/research-publications/balancing-duties-litigation/]. We also identified room for improvement in training.

We committed to carrying out a further thematic review on SLAPPs to look at whether there have been improvements in working practices and the steps firms are taking to comply with our warning notice. We also committed to reviewing how firms are managing the risks around the funding of litigation and instruction of PR companies and PIs.

We conducted a thematic review looking at:

- knowledge and understanding of SLAPPs
- compliance with our warning notice
- the right to reply process
- the behaviour of claimant/defendant firms
- how concerns about SLAPPs are being reported to us
- the process of onboarding clients
- how firms are using, and the instructions given to, PR companies and PIs
- the training given to solicitors, and their continued competence in reputation management work

Our thematic reviews do not uncover all of the potential issues associated with a specific area of work, so this is not an exhaustive list. In particular, we do not engage with any firm that we are currently investigating for potential misconduct in that area during a review. The information we gather to paint a picture of what is happening comes from many sources, not just our reviews.

Nor do we look at the work undertaken by those outside of our regulatory remit, so for example with this review we did not look at the work of PR firms or PIs. Our review was limited to the way in which law firms engage with those third parties.

What we did

We have undertaken a thematic review on SLAPPs to identify:

- whether there have been improvements in working practices.
- the steps firms are taking to comply with our warning notice.

To facilitate this, we visited firms that provide legal services in reputation management matters. At each firm, we spoke with a:

- Partner or the person with overall responsibility for reputation management matters ('head of department', 20 in total).
- Junior fee earner doing reputation management work (18 in total).

At each firm we also reviewed two files in relation to reputation management matters, so 40 files in total.

We also met with lawyers working in-house at media organisations. While some of the questions we asked them were similar to those we asked firms working in reputation management, we took a slightly different approach to understand their perspective.

This thematic review contributes to our wider intelligence information. Alongside issues raised in our casework and the findings from those cases, the results of this thematic review help to inform our ongoing policy work. This includes work to update our guidance and policies. We are currently updating our warning notice, and we have particularly taken into account experiences from our casework to inform that update.

In addition to this thematic review and the findings of our investigations, our regulatory approach to SLAPPs is also informed by our engagement with external stakeholders. To date, we have liaised with the Foreign Policy Centre, the Department for Digital, Culture, Media and Sport Taskforce, the Society of Media Lawyers, the Claimant Lawyers Group, and the Bureau of Investigative Journalism. We will continue to have discussions with thinktanks, taskforces, representative groups, campaigners and journalists to make sure we understand their insights.

What we found

Again, although we recognise that our reviews only represent a snapshot of what is going on, the following were the themes we identified from our work. Our reviews will not fully uncover all of the themes, good practice or areas of concern.

Understanding of strategic lawsuits against public participation

- All heads of department and fee earners understood what a SLAPP is, highlighting key features.
- Most heads of department (15) and fee earners (17) and all in-house media lawyers thought SLAPPs are a concern.
- We saw indicators of a SLAPP on one of the 40 files we reviewed, where the conduct of the firm acting on the other side appeared to include, excessive and disproportionate correspondence, and potentially pursuing a meritless claim. We are investigating this matter.
- In our conduct in disputes thematic review, we found that most firms did not have policies on handling litigation or reputation management matters. In this latest review, we found a similar picture - of the firms we visited, most (17) did not have policies on how fee earners identify and deal with SLAPPs.

Compliance with SRA warning notice

- All heads of department and fee earners were aware of our warning notice.
- When asked, all heads of department and fee earners were able to highlight the key messages from our warning notice.
- Over half of the heads of department said the warning notice had a positive impact on their daily work.
- Half of the firms we visited have made changes to their working practices following the warning notice.
- In-house media lawyers noted that, although issues remain, there have been some positive changes in law firm behaviour following publication of the warning notice.
- We did see the use of labelling on correspondence (for example, 'not for publication') but all the examples we saw were used appropriately.

The right-to-reply process

- Half of the heads of department said they typically get a day or less to respond to requests for information from journalists or media organisations about matters intended for publication.
- Claimant firms use a variety of steps to make sure they do not use the right to reply process in bad faith. However, in-house media lawyers said they continue to receive responses from claimant firms which they think are designed to unreasonably delay or deter publication.
- We saw no evidence on our file reviews of the right to reply process being used in bad faith to delay or deter publication.

Firm behaviours

- Some defendant firms and in-house media lawyers have noted an increase in claims/requests with a data protection element. For example, supplementing defamation claims with subject access requests and allegations of data breaches.
- Over half of defendant firms and all in-house media lawyers said they had seen aggressive behaviour from some claimant firms, although they did not believe the behaviour was sufficiently serious to report the matter to the SRA.
- Several heads of department at claimant firms also noted issues with the behaviour of in-house media lawyers – for example, giving unreasonable deadlines and raising defences with limited prospects of success. However, none have reported their concerns or considered it necessary to do so.

Reporting

- All in-house media lawyers and most firms were aware of our guidance on reporting and notification obligations.
- None of the firms or in-house media lawyers had reported a SLAPP to us over the past 18 months. However, two firms had made reports about inappropriate conduct of litigation. One of those reports was investigated and then closed with no further action. The investigation of the other matter is ongoing.
- During our file reviews, we identified concerns on two files that we thought should have been reported to us. The firms acting on those matters had not made reports. On one file, there was potential dishonesty by the client's former firm, which we are investigating. On the other file, as mentioned above, the claim which the firm was defending had several indicators of a SLAPP. We are investigating this matter.
- Reporting of potential breaches remains a concern. Three firms did not make a report to us about the conduct of other firms when they now think they should have done. We have discussed these matters with them. We are investigating three matters.

Client onboarding

- All firms said they carried out some form of due diligence on all clients, including reputation management clients.
- Client identification, verification and sanctions checks were done on most of the files we reviewed.
- Half of the firms said they carried out source of funds/wealth checks on reputation management clients despite matters being outside the scope of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. Source of funds/wealth checks were carried out on over half of the files we reviewed.

Instruction of Public Relations companies and Private Investigators

- We did not see evidence of unlawful or improper conduct by a PR company or PI in our file reviews. However, one firm had suspected that the opposing firm on a previous matter had hired a PI to obtain evidence illegally. We are investigating this matter.
- Firms could do more to make sure that the PR companies and PIs they instruct, and any third parties they subcontract to, are acting appropriately and lawfully.
    - Few firms had a written policy or a template letter of instruction/terms of engagement with a PR company/PI.

- Only some firms reviewed the arrangements between the PR company/PI and third parties they may instruct.
- None of the firms carried out formal due diligence (such as checks on financial/solvency status, criminal records, accreditations and qualifications) when instructing a PR company/PI.

Training and competence

- Our conduct in disputes thematic review identified room for improvement in this area. Overall, fee earners at the firms we visited as part of this review had a good standard of training and competence in relation to SLAPPs, conduct in disputes, and source of wealth/funds checks.
- Most fee earners (14) had received no training on instructing and working with PR companies or PIs. Only three heads of department had received training on instructing PR companies and only four on instructing PIs.

Next steps

During the course of producing this thematic review, we have sought feedback from law firms and in-house media lawyers on the warning notice we issued in 2022. Many have made helpful suggestions, such as requesting more case studies and examples to help identify good and poor practice.

Taking on board the findings from this thematic and the feedback we have received from stakeholders, we are currently reviewing our warning notice to help firms and solicitors comply with their regulatory obligations in this area and plan to publish an updated version shortly.

While carrying out this thematic review, we have joined the government's taskforce on SLAPPs. The taskforce brings together government, representative bodies, civil society groups and journalists to increase understanding and awareness of SLAPPs and to develop non-legislative responses. We have shared the findings of this review and our broader work with other members the taskforce.

We will also continue to work with organisations supporting potential victims of SLAPPs to encourage reporting to us.

Thematic Review with Firms

Understanding of Strategic Lawsuits Against Public Participation (SLAPPs)

Why this is important

Claimants should have access to legal advice and representation to protect their legitimate rights, including those relating to their privacy and reputation. Solicitors should act fearlessly in their clients' best interests.

However, this does not extend to abusing the legal system to bring meritless, oppressive or abusive claims against an opponent with the aim of stifling free speech. Such conduct is unacceptable and not in the public interest. Representing clients' interests in this way is likely to breach a solicitor's duties to act with integrity and uphold the rule of law. It is also incompatible with their position as an officer of the court.

The government has also voiced its concerns that SLAPP cases are an abuse of the legal system. The Economic Crime and Corporate Transparency Act 2023 (the Act) defines the characteristics of a SLAPP relating to economic crime in law for the first time, creates a new early dismissal process, and introduces costs provisions within the court system. However, our regulatory powers and framework are not limited to economic crime or contingent on a claim being declared a SLAPP under the Act. We have a broad regulatory framework in place to allow us to address misconduct in a litigation context.

What we expect

Solicitors and law firms must comply with our Principles [https://contact.sra.org.uk/solicitors/standards-regulations/principles/] and in particular:

- 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.

They must also comply with the relevant paragraphs in the Code of Conduct for Solicitors, RELs and RFLs [https://contact.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/] and the Code of Conduct for Firms [https://contact.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/] where applicable. For example:

- Paragraph 1.2 of the Code of Conduct for individuals 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 individuals states that you must not 'mislead, or attempt to mislead your clients, the court 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 of the Code of Conduct for individuals 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).

Solicitors should make sure they are familiar with both our conduct in disputes guidance [https://contact.sra.org.uk/solicitors/guidance/conduct-disputes/] and warning notice [https://contact.sra.org.uk/solicitors/guidance/slapps-warning-notice/] which sets out their obligations in this area and how to comply with them. We will have regard to these when exercising our regulatory functions.

What we found

Understanding SLAPPs

All heads of department and fee earners we interviewed understood what a SLAPP is and highlighted a variety of key features associated with this type of abusive litigation. This is helpful because awareness at a senior level can be passed on to other members of the team, through training and supervision.

Most heads of department (15) told us that SLAPPs are a concern because they:

- directly impact on free speech and the legitimate reporting of matters in the public interest
- are unmeritorious claims and an abuse of the legal system
- affect recipients of correspondence if it is aggressive and/or intimidatory
- have become a tactical tool to 'take someone out of the game'
- undermine trust in the legal profession and bring it into disrepute.

Four heads of department told us they 'may be' a concern, because:

- such cases are rare in their experience
- the public perception of the risk is greater than the reality
- there is a need to strike a balance between freedom of expression and the right to privacy
- there are already safeguards in the legal system to address this issue.

Only one head of department and one fee earner thought SLAPPs are not a concern. They said this was because they do not see SLAPP cases in their day-to-day practice.

All in-house media lawyers we interviewed felt more strongly than the firms that SLAPPs are a concern. Comments we received included:

- 'it is an abuse of process that needs to be curtailed. They are quite widespread and common. We are still getting law firms using aggressive or SLAPP tactics to try and shut down publication'
- 'there is a lack of awareness from claimant law firms and barristers on the effect of SLAPPs and these kinds of litigation tactics on individuals (for example, the emotional and personal toil'
- 'we have got used to the excessive and disproportionate correspondence, as we are a large media organisation with an in-house legal team. But small outfits or freelance journalists might not have'
- 'the frequency of SLAPPs behaviours has been normalised and we are used to seeing it from certain law firms. It is not just a legitimate protection of clients' rights – that is used as a smoke screen for excessive and oppressive correspondence which is aimed at blocking legitimate enquiry. The provisions within the legal system to tackle abuse of process (for example, case management, costs budgeting) do not cover pre-publication and pre-action conduct'.

This divergence in attitudes is representative of the polarised views we found around SLAPPs.

None of the in-house media lawyers we interviewed had reported a firm or an individual to us for their conduct in relation to a case they thought was a SLAPP, although some are considering whether they need to. We have had discussions with them about the importance of reporting matters if necessary and the types of situations where the obligation to report would be triggered.

Abusive conduct (including a SLAPP) should not be normalised or accepted by anyone. We understand that assessing whether conduct is abusive can be challenging and fact-specific. Where you have legitimate concerns about conduct, you should report them to us. We can then consider whether there has been a breach of our Standards and Regulations and whether enforcement action is required. It is important to remember that we can investigate and review a matter at any stage of the legal process, including pre-action and pre-publication. Please refer to the section in our Code of Conduct for Firms on 'Co-operation and accountability [https://contact.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/#rule-3] ' and our guidance on reporting and notification obligations

[https://contact.sra.org.uk/solicitors/guidance/reporting-notification-obligations/] for more information.

We were concerned that one out of the 40 files we reviewed had features of a SLAPP. On that file, which involved a matter of public interest, a firm acting on the other side of the matter appeared to:

- make aggressive threats
- pursue a meritless claim
- send an excessive number of letters that were disproportionate to the issues in dispute and the responses received.

We are investigating this matter.

Policies

We examined whether firms had policies to detect and prevent abusive litigation, including SLAPPs. Previously, our conduct in disputes thematic review [https://contact.sra.org.uk/sra/research-publications/conduct-disputes/] found that most firms we engaged with did not have any formal policies and procedures in place on how to deal with litigation or reputation management matters.

Notwithstanding the good understanding of SLAPPs and awareness of our warning notice at the firms we visited during this latest review, most firms (17) we visited did not have policies on how fee earners identify and deal with SLAPPs. Some firms said they did not do enough reputation management work or had not seen enough SLAPP cases to justify having a policy. From a risk perspective, this raises questions about how firms ensure they are able to consistently identify and address issues around SLAPPs, particularly where less experienced fee earners are undertaking this work.

Although not mandatory, policies can serve as a:

- way to raise awareness of SLAPPs
- method of setting the firm's expectation of fee earners
- reminder to fee earners of the key features and red flags associated with SLAPPs, to help with identification
- point of reference for fee earners to refer back to
- foundation on which to build and deliver training
- mechanism to assist fee earners understand when and who to report matters to where concerns arise (see 'Reporting' section below)
- tool to make sure the firm has a clear record of key issues and concerns, and that all staff understand their obligations and the specific risks that can arise in this area.

Case study - benefits of a policy

Firm A is a large national firm which provides legal services in reputation management matters. It has put together a comprehensive policy on conduct in disputes which covers:

- identification and key features of a SLAPP
- our guidance on conduct in disputes, our warning notice and relevant thematic reviews
- key regulatory obligations (see above)
- legislative developments
- duties in practice when handling litigation
- reporting obligations.

The policy has been circulated to all fee earners in the litigation team and is available on the intranet and accessible at all times. It has been positively received, used as the basis for training (for existing and new fee earners) and as a helpful reminder for fee earners to refer to. By helping fee earners identify abusive conduct and reminding them of their regulatory duties, the policy also serves to help protect the firm's reputation.

Checklist for firms/solicitors

- Familiarise yourself with the red flags set out in our warning notice [https://contact.sra.org.uk/solicitors/guidance/slapps-warning-notice/] so you are aware of behaviours that might amount to a SLAPP.
- Put in place a policy to help fee earners identify and address SLAPP behaviour. The policy should highlight their regulatory obligations in this area.
- Continue to monitor and reflect on your actions and those of others in your firm to make sure their conduct is not improper.
- If you believe a matter is abusive, make a report to us so that we can consider whether any further action is needed.

Our findings

Open all [#]

Compliance with our warning notice

Why this is important

We issued a warning notice [https://contact.sra.org.uk/solicitors/guidance/slapps-warning-notice/] because of concerns that some law firms and solicitors are pursuing SLAPPs on behalf of clients. Our warning notice is there to help those we regulate understand and comply with their obligations. We will have regard to it when exercising our regulatory functions and will take firm and solicitor compliance with it seriously.

The warning notice highlights features of SLAPP claims and red flags for firms to look out for. It also cautions against using labels in correspondence, such as 'private and confidential' or 'not for publication', when they are inappropriate, or their meaning or consequences are not properly explained.

What we expect

As set out in our warning notice, we expect law firms and solicitors to:

Identify SLAPPs

- identify proposed courses of action (including pre-action) that could be defined as SLAPPs, or are otherwise abusive and decline to act
- advise clients against pursuing a course which amounts to abusive conduct, including making any threats in correspondence which are unjustified or illegal

Conduct of the case

- not seek to threaten or advance meritless claims, including in pre-action correspondence, and including claims where it should be clear that a defence to that type of claim will be successful based on what is known
- not claim remedies to which the client would not be entitled on the facts
- not make aggressive threats

- not send an excessive number of letters that are disproportionate to the issues in dispute and the responses received
- not send correspondence with restrictive labels (see below) that are intimidating and inaccurate
- not pursue unnecessary and onerous procedural applications, intended to waste time or increase costs
- take reasonable steps to satisfy themselves that a claim is properly arguable before putting it forward, either in correspondence or via an issued claim
- have considered the prospects of a proposed course of action being unsuccessful or counter-productive, and to have advised clients properly before starting

Labelling correspondence

- make sure they do not mislead recipients of their correspondence, and to take particular care where that recipient might be vulnerable or un-represented
- carefully consider whether there are proper reasons for labelling correspondence 'not for publication', 'strictly private and confidential' and/or 'without prejudice' and the conditions for using those terms are fulfilled
- if there are proper reasons, consider whether further explanation is required where the recipient might be vulnerable or lacks legal understanding
- advise clients that labels cannot unilaterally impose a duty of privacy or confidentiality where one does not already exist and there is a risk that a recipient might properly publish correspondence which is not subject to a pre-existing duty of confidence or privacy.

What we found

Understanding of warning notice

In our conduct in disputes thematic review [https://contact.sra.org.uk/sra/research-publications/conduct-disputes/#:~:text=Firms%2Findividuals%20must%20not%3A,which%20are%20unjustified%20or%20illegal.] we found that not all heads of department and fee earners were aware of our guidance on conduct in disputes [https://contact.sra.org.uk/solicitors/guidance/conduct-disputes/] and balancing duties in litigation [https://contact.sra.org.uk/sra/research-publications/balancing-duties-litigation/] . In this thematic review, all heads of department and fee earners were aware of our warning notice. One in-house media lawyer we interviewed was not aware of our warning notice. Only one firm had not circulated the warning notice to all members of the team, but the fee earner we interviewed at the firm was nevertheless aware of it.

Most heads of department also confirmed they understood their obligations under the warning notice and in particular the behaviours commonly associated with a SLAPP. Only two heads of department said they would need to refer back to the warning notice to definitively confirm the associated behaviours and obligations. All fee earners we interviewed were aware of their obligations set out in our warning notice.

Heads of department and fee earners were able to identify a number of the key features of a SLAPP, with the most common being:

- that the target is a proposed publication on a subject of public importance
- seeking to advance or threaten meritless claims
- making unduly intimidating or aggressive threats.

It is, however, important to remember that our warning notice highlights a number of red flags which were not routinely mentioned by heads of department and fee earners, including:

- sending an excessive number of letters that are disproportionate to the issues in dispute and the responses received
- claiming remedies to which the client would not be entitled on the facts, such as imprisonment upon a civil claim, or specific or exaggerated costs consequences
- pursuing unnecessary and onerous procedural applications, intended to waste time or increase costs
- claiming in a jurisdiction unconnected with the parties.

More than half of the heads of department (11) (and under half of the fee earners (eight)) said the warning notice had positively impacted on their day-to-day work. Ways in which this had manifested included:

- 'discussions with the client about regulatory obligations happen sooner, from the outset of an instruction'
- 'greater consideration is given to the use of labels in correspondence and whether it is properly necessary'
- one head of department told us 'it is in our mind – I thought about it generally before but now we have somewhere to go to and look at'
- 'it has heightened awareness of regulatory issues and concerns'
- 'the warning notice has given this area some structure, allowing us to focus on what we are doing and what we have to be aware of'
- 'reputation is an emotive issue and many clients will need to be 'talked down' so we use the warning notice to advise them if something might seem like a SLAPP'
- 'it has informed our thinking - especially on labelling and best practice. It has reminded us of general principles'.

Half (10) of the heads of department told us they had also changed their working practices in the following ways to take account of the warning notice:

- using a softer tone/language when sending out letters
- re-considering when to use labels on correspondence and what the label should properly say. One firm told us that it has changed 'not for publication' to 'not intended for publication' and now provides an accompanying explanation on why it is not intended for publication
- explaining which parts of a letter are covered by labels used and which are not
- using the warning notice as a basis to increase training on SLAPPs
- using the warning notice as a basis to create a policy on SLAPPs and conduct in disputes
- involving the firm's internal legal/compliance team on any matter involving a journalist or media organisation. This adds an additional layer of scrutiny on whether a potential instruction has any features of a SLAPP
- using the warning notice as a checklist against new instructions
- reviewing the warning notice once the firm has undertaken a merits assessment and/or received advice from counsel.

Firms use a variety of methods to make sure the warning notice is applied across their work in this area and to identify proposed courses of action that could be defined as SLAPPs or might be otherwise abusive. This included formal and informal training, partner supervision, and comprehensive evidence gathering at the outset.

Firms and fee earners also took a variety of steps to consider the prospects of a proposed course of action being unsuccessful or counter-productive. We saw several firms gathering and reviewing evidence at the outset of matters and critically

assessing the merits of cases at an early stage. We also saw high levels of senior input on matters and regular involvement of counsel.

Case study

Firm B is a large city firm that handles reputation management matters. It is contacted by a potential client late in the evening about a newspaper article that is about to be run. The partner reviews the matter. As it concerns an instruction which involves a media organisation, the partner refers the matter to the firm's general counsel team in compliance with the firm's internal procedures. The instruction is reviewed by the team who clears the firm to act. This layered approach helps the firm identify matters which might be abusive and provides an extra level of scrutiny when accepting instructions, particularly in urgent and pressurised situations.

Labelling

Labelling is important because letters wrongly marked 'private and confidential' and/or 'not for dissemination' can intimidate the recipient and deter them from seeking professional advice and reporting abusive conduct, including a potential SLAPP.

Firms and fee earners said they use a variety of methods to make sure they label correspondence appropriately, especially where the recipient is vulnerable or unrepresented. This included training and supervision. A small number of firms told us they either never use labels or stopped using labels following our warning notice because they were unsure whether it was appropriate or not. In light of the feedback we received, we will supplement our warning notice with case studies/examples.

Most in-house media lawyers said that although issues remain, they had noticed some positive changes in law firm behaviour following publication of our warning notice. This included fewer instances of firms inappropriately labelling correspondence.

Most heads of department and fee earners told us they now provide additional information to a recipient when labelling correspondence, particularly where the recipient may be vulnerable or unrepresented. This included providing an explanation of the label and the effect of using it.

Heads of department (18) also said they advise clients (in writing and/or at a meeting) that such labels or markings cannot unilaterally impose a duty of privacy or confidentiality where one does not already exist. They also warn clients of the risk that a recipient might properly publish correspondence which is not subject to a pre-existing duty of confidence or privacy. Heads of department told us that this was a crucial part of the process as they had experience of letters being published. All clients should be advised and warned of this risk.

Where a recipient is vulnerable or unrepresented, all heads of department said they make it clear to the recipient that they should seek legal advice on any correspondence sent to them. We consider this to be good practice.

Where a recipient indicates they wish to publish correspondence they have received, and there is no specific reason which prevents this, most heads of department said they would not take any steps to deter them from doing so. One head of department said if they were to follow up with the recipient, they would make sure they were not misled as to the consequences by providing a clear explanation of the position and recommending the recipient seeks legal advice, as well as signposting them to it.

We did see the use of labels during our file reviews but no evidence they were used inappropriately. Where the recipient was unrepresented, firms made it clear in correspondence that they should seek legal advice. On two files, the recipient said they wished to publish the letter received and the respective firms did not deter them from doing so.

Checklist for firms/solicitors

- Make sure you are aware of the regulatory obligations and expectations set out in our warning notice. You must adhere to these at the outset and throughout a case.
- Consider whether you can add any systems or processes to help make sure that you do not take on cases which are abusive.
- Consider whether there is another level of scrutiny or checks that can be introduced on any matter involving a journalist/media organisation to see if a potential instruction has any features of a SLAPP.
- Undertake a merits assessment at an early stage on each file to help give you a clear view at the outset as to whether a matter may be abusive.
- Make sure there is a legal basis for putting forward any claims and that proceedings are pursued properly.
- Think carefully about whether you need to use labels at all in your correspondence. If you do, consider the language and labels you use to make sure they are appropriate and there is a proper basis for using them.
- Consider whether a further explanation is required to make it clear why correspondence is being labelled as 'strictly private and confidential', 'not for publication' or 'without prejudice'.
- Use the warning notice [https://contact.sra.org.uk/solicitors/guidance/slapps-warning-notice/] as a checklist against new instructions, including the key features/red flags of a SLAPP.

The right to reply process

Why this is important

A right to reply process allows:

- those who are the subject of a publication an opportunity to respond and have a fair chance to defend themselves
- a journalist an opportunity to check information and help ensure accuracy.

If media organisations or journalists do not properly and fairly engage with the right to reply process, individuals could suffer lasting harm to their reputations. They could face baseless, fraudulent or dishonest allegations without a fair opportunity to defend themselves.

If the right to reply process is used in bad faith by individuals and/or their representatives, it can delay publication or lead to the removal, or partial removal, of information which it is in the public interest to publish. This could occur because of:

- excessive and unnecessarily protracted correspondence
- unmeritorious threats of legal action
- an aggressive response
- a deliberate attempt to exhaust the resources of a journalist (especially if they do not have the benefit of representation through a media organisation) rather than engaging with the issues.

What we found

The right to reply process is a contentious area, particularly around what is considered to be reasonable behaviour on both sides.

Some in-house media lawyers told us that law firms were abusing the right to reply process to delay or deter publication in the following ways:

- making unreasonable requests for extensions of time
- excessive and overly aggressive correspondence
- unmeritorious threats of legal action
- a refusal to engage with the factual issues.

Claimant law firms also raised concerns including:

- the difficulties of independently verifying the accuracy of a client's instructions in the timeframes provided
- timeframes and pressures of the right to reply process undermining clients' rights to properly defend themselves and freely access legal advice
- the difficulties of addressing multiple allegations where little detail is provided
- that the issues addressed in the right to reply process are too narrow and ignore potential breaches of privacy, confidence, data protection rights, and harassment laws
- the distress that a request for information as part of the right to reply process may cause where individuals and/or companies will be publicly accused of serious wrong-doing
- the level of scrutiny they should be expected to apply before advancing a client's case where deadlines are extremely tight and information difficult to obtain.

Most firms (16) we visited acted on matters where their client was given a right to reply by a journalist. The most common issues they raised were:

Right to reply - Issues

Unnecessary pressure created	14
Difficult to obtain information from client in time given	13
Difficult to verify client's instructions in time given	11
Difficult to check accuracy of article in time given	8
Right to reply letter being sent is delayed	6
Distressed client	4

Other concerns raised included:

- letters deliberately being sent on a Friday night or over the weekend
- allegations are vague and obscure
- no response to the right to reply response letter is ever received
- it is a box-ticking exercise
- being deluged with irrelevant questions.

More than half of the heads of department (10) that have worked on right to reply matters said they typically get a day or less to respond. This can create difficulties, particularly if the journalist has sent a lengthy letter and raised numerous queries. One head of department noted they had been given less than three hours to provide a response and a fee earner said they had been given less than an hour to respond. Another head of department told us they had been given less than 24 hours to deal with serious and complex allegations of corruption against their client.

Unsurprisingly, most heads of department said the deadlines were unfair but could be mitigated in some instances by negotiating an extension. They told us that the granting of an extension depended on the media organisation, with more mainstream publishers or broadcasters willing to do so.

In-house media lawyers said in most cases they considered deadlines given were fair and requests for extensions of time were often unreasonable. Some in-house media lawyers (three) also said that they see firms using the right to reply process in bad faith - for example, sending protracted, unnecessary and intimidating correspondence in an attempt to delay publication. We have requested that these matters be reported to us to consider further. Comments received included:

- 'journalists frequently receive long letters in response to requests for information which have three pages of legal threats and might have answers to factual questions at the back'
- 'the aim of some firms is to obfuscate and delay. Often they will say there is some travelling or time zone reason for delay. However, this is asserted so often it cannot be true. Usually the legal letters are a semantic dissection of the points put for comment. Or they say that no allegations have been properly put so they cannot answer the questions until they are written in a certain way, and when those are received they will need to take instructions before responding, with a further delay'
- 'in one case we got three 75-page long letters, we got very detailed points under a 'confidential and not for publication' banner'
- 'replies can be evasive and avoid answering the questions, or just say that the questions are not legitimate. It is followed by a threat to sue if we publish'.

We reviewed eight files which had a right to reply. We found no evidence of the right to reply process on these files being used in bad faith to delay or deter publication. We did find short timeframes given on three matters. On one file, the journalist gave less than 24 hours to respond and two requested a response as soon as possible to answer a series of detailed and queries about historic matters where there was no apparent urgency for publication.

Checklist for firms/solicitors

- If you are acting for a journalist, media organisation, or publisher, make sure that the deadlines set in the right to reply process are reasonable. Consider:
  - the amount of information sought
  - the number and complexity of queries
  - the urgency of the publication
  - the ability of a firm to engage with its client.
- Responses to right to reply correspondence should be reviewed to make sure they are appropriate.
- Correspondence should not:
  - be excessive and unnecessarily lengthy or complex
  - be needlessly drawn out or protracted
  - threaten legal action where there are no legitimate grounds for doing so
  - be overly aggressive and/or intimidating.
- Consider whether it would be useful to put in place:
  - training and/or templates on responding to right to reply correspondence
  - supervision arrangements to check the responses being sent.

Firm behaviours

Why this is important

Firms and solicitors must be satisfied that there is a proper legal basis for their litigation conduct. Every claim or defence must have legal merit. Firms and solicitors must also make sure that their conduct is compliant with their regulatory obligations. Whether they are acting pre or post the issue of proceedings, firms and solicitors must make sure their conduct upholds the rule of law, proper administration of justice, and public trust and confidence in the legal profession. Overly aggressive and intimidatory approaches, advancing cases where there is little or no merit, creating disproportionate costs and unnecessarily occupying court time, are likely to be contrary to these duties. They could also result in a failure to act in the best interests of the client.

This section deals with a variety of issues around how litigation is conducted, including the basis of claims and behaviour of claimant and defendant firms.

What we found

What gives rise to reputation management claims?

Heads of department and fee earners at defendant firms gave a variety of reasons why reputation management claims arise. Naturally, most said that this was to do with the truth of the publication in question. A rise in social media apps - resulting in it being easier to publish views widely and anonymously - also accounted for an increase in claims in this area.

Are data protection provisions being used in reputation management claims?

Several heads of department said there was an increase in claims or requests with a data protection/General Data Protection Regulations (GDPR) element. One head of department noted that there are more firms now making GDPR and data breach claims within defamation matters. In-house media lawyers also noted that there was an increasing trend for some claimant law firms to use data protection laws to avoid the legal protections or limitation defences available to defendants in defamation claims. This included bringing data protection claims where they were:

- not properly arguable and lacked merit
- deliberately brought to cause maximum inconvenience
- manifestly excessive.

Where firms bring such claims on behalf of a client, they must make sure there is a proper and legitimate basis for doing so.

Who drives reputation management claims?

We wanted to understand whether claims were driven by firms and/or clients. Only one head of department told us that claims were generally firm led. Eight heads of department and five fee earners said they tended to be client led, with six heads of department and four fee earners adding that they were firm and client led. Two in-house media lawyers said claims tended to be firm and client led and another two said they were client led.

This is an area where firms and solicitors must tread carefully. For example, they must advise clients accordingly if a client wishes to pursue a case with little or no merit. They should not advise clients to proceed with litigation where there is little or no merit in doing so. Issues might arise because of a conflict with the solicitor's own interest in generating fee income. Alternatively, a solicitor may want to pursue the litigation notwithstanding the lack of merit in order to keep a longstanding client 'happy' and fail to act with sufficient independence.

The courts have criticised solicitors for conducting cases in an excessive way and pursuing cases which lack merit (see for example Excalibur Ventures LLC v Texas Keystone Inc and others [2013] EWHC 4278 (Comm) [2013]).

Solicitors are responsible for the strategy of their client's case and must ensure any strategies comply with our Standards and Regulations and their duties to the court.

How do firms conduct reputation management matters?

We asked firms and in-house media lawyers whether they had concerns about the behaviour of firms on the other side of disputes. Over half of firms and all in-house media lawyers told us that they did. The concerns included:

- being overly aggressive
- raising defences with limited prospects of success
- setting unreasonable deadlines
- drawing out proceedings unnecessarily.

However, when discussed, firms, fee earners and in-house media lawyers did not believe a threshold had been crossed to report these behaviours. Many put such behaviour down to the 'cut and thrust' of normal litigation, and others did not think it was sufficiently serious. We have followed this up with them to check they understand their reporting and notification obligations and when it is appropriate to make a report. Where behaviour does cross the line and litigation is being conducted abusively, it should be reported to us (see 'Reporting' section below for more detail).

Is it legitimate to pursue a journalist?

More than half of the heads of department (12) and seven fee earners said there may be legitimate reasons to pursue a journalist personally. This might be because the journalist was:

- personally culpable
- acting in a freelance capacity
- acting outside the bounds of their contract of employment or
- pursuing a specific and personal grudge against the client.

All in-house media lawyers we interviewed said it was an issue where law firms pursued a journalist individually rather than/as well as the media organisation (for example, where they considered it to be a tactic used to create pressure). In-house media lawyers also told us of numerous occasions, across different jurisdictions, where they were aware of a journalist being pursued individually (rather than/as well as a media organisation) in an oppressive manner. One in-house media lawyer told us that the danger was that 'if someone sues the author only and the author is scared, they make concessions in order to get out of litigation'.

Eight heads of department and two fee earners said they may be negligent if they did not consider pursuing a journalist personally. Firms and solicitors should, however, ensure that there is proper reason to pursue an individual.

Checklist for firms/solicitors

- Do not raise claims or defences which are meritless or over-exaggerated.
- Make sure you have a proper legal basis to raise any claims or defences, including those relating to breaches of data protection laws.
- Check that your litigation strategy is proportionate to the issues in dispute. Do not use practices which are abusive or excessive.

- Be mindful of the language and tone you use in communications. Make sure that it is not aggressive or intimidatory.
- Do not act on a matter or in an area where you are not competent to do so.
- Scrutinise your conduct to make sure that your ability to act with independence is not compromised by an overriding desire to 'please' a longstanding client or generate fee income.
- When instructed on a matter, collate and review all the evidence available and provide the clients with a merits assessment. This will help identify gaps and weaknesses in your case and inform the actions you can and cannot take.

Reporting

Why this is important

Solicitors and firms have a duty to promptly report any facts or matters that are capable of amounting to a serious breach of our Standards and Regulations. This is important as it allows us to take necessary actions to protect clients and the public interest. Reports of SLAPPs and abusive litigation also help us to understand the scale of the problem and the issues that arise.

Our conduct in disputes thematic review [https://contact.sra.org.uk/sra/research-publications/conduct-disputes/] found that solicitors and firms should take further steps to make sure they are aware of their reporting obligations. This included being familiar with our guidance on reporting and notification obligations, [https://contact.sra.org.uk/solicitors/guidance/reporting-notification-obligations/] when it would be appropriate to make a report to us and the factors that should be taken into account when considering whether to do so.

What we expect

Paragraph 7.7 of the Code of Conduct for individuals [https://contact.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/] and paragraph 3.9 of the Code of Conduct for Firms [https://contact.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/] requires solicitors and firms to promptly report any facts or matters that they reasonably believe are capable of amounting to a serious breach of our Standards and Regulations. Further detail is provided in our guidance on reporting and notification obligations which sets out when and how to report a matter to us. We expect solicitors and firms to understand and comply with the codes of conduct and our guidance.

What we found

Considering whether to make a report

All in-house media lawyers and most heads of department (17) and fee earners (14) were aware of our guidance on reporting and notification obligations. Three heads of department and four fee earners were not, and we directed them to it. Many of them said that if they had concerns about a matter, they would discuss it with their Compliance Officer for Legal Practice (COLP) and seek advice on reporting. It is important that all fee earners are aware of our guidance as it will help them understand their personal responsibility to report and when to raise an issue with their firm's COLP.

We asked heads of department, fee earners and in-house media lawyers what factors they took into account when deciding whether to report a matter to us. All in-house

media lawyers and almost all heads of department (19) and fee earners (17) considered the seriousness of the breach as a key factor.

What factors do you take into account when deciding whether to report a matter?

	Heads of department	Fee earners	In-house lawyers
Seriousness of the breach	19	17	5
Strength of evidence	6	4	4
Resource available	-	-	3
Client impact	3	-	-
Ongoing relationship with firm	-	-	1
Legal retaliation	-	-	1

Firms and solicitors are under an obligation to report anything they reasonably believe is capable of amounting to a serious breach of our regulatory arrangements. We identified in our conduct in disputes thematic review that some firms misunderstood the factors they need to take into account when considering whether to do so. This continues to be the case. Firms told us they did not report matters because:

- the misconduct took place over 18 months ago and has now stopped
- it would imply that they had a weak case in the litigation
- it would make it more difficult to reach a settlement
- they did not have all of the evidence of misconduct.

None of these reasons justify not reporting a matter to us where there is reason to believe there has been serious misconduct.

It is also not necessary for firms or solicitors to have all of the evidence to hand before deciding to make a report to us if the seriousness threshold has been reached. We have powers that we may exercise to obtain further information and evidence. If there is any doubt about whether to make a report, firms and solicitors should err on the side of caution and do so. Any concerns about how a report impacts ongoing litigation should be explained to us and we will take those concerns into account when deciding how to investigate the issues. If the potential wrongdoing pre-dates the warning notice, firms and solicitors should still report it to us. The warning notice does not add new requirements to our Standards and Regulations; rather it explains the way in which they apply in the specific circumstances of SLAPP cases.

Further guidance on whether and how to report a matter is available through our Ethics Guidance Helpline [https://contact.sra.org.uk/contactus] and the 'Reporting a solicitor [https://contact.sra.org.uk/consumers/problems/report-solicitor/] ' content on our website.

Reporting matters to us

Over the past 18 months, none of the firms, fee earners or in-house media lawyers had reported a firm or solicitor for conduct in relation to a case which they considered to be a SLAPP or for the inappropriate labelling of correspondence. However, one firm's defendant client had reported a case to us which they considered to be a SLAPP. They also suspected that the claimant firm had obtained evidence using unlawful methods. We are investigating this matter further.

None of the in-house media lawyers had reported a firm or solicitor for abusing the right to reply process or for their conduct during litigation. One firm had reported a

solicitor to us for breaching confidentiality and making what they considered to be unreasonable demands without merit. We have engaged with the parties, obtained further evidence and satisfied ourselves that further action was not required.

None of the firms we visited, the fee earners we interviewed or their clients had been the subject of any adverse costs awards in relation to abusive conduct or a SLAPP claim. However:

- On one file we reviewed, there was an indemnity costs order for unreasonable conduct made against a claimant represented by another firm. The case had features of a SLAPP. We are investigating this matter.
- One firm had a client who had received judicial criticism for deliberate dishonesty, but this was prior to the firm's instruction. We are investigating the conduct of the firm which previously acted for that client.

We identified in our conduct in disputes thematic review that firms misunderstood when it would be appropriate to make a report to us. In this thematic review on SLAPPs, three firms did not make a report to us where conduct might have been an issue. We have asked all of the relevant firms to review the matters and have clarified the factors that are not relevant when considering whether to make a report. We are currently investigating three matters.

Checklist for firms/solicitors

- Promptly report any matters that you reasonably believe are capable of amounting to a serious breach of our Standards and Regulations to us. If you are in any doubt, you should speak to your COLP or discuss it with us.
- Make sure you are aware of and understand:
  - our enforcement strategy [https://contact.sra.org.uk/sra/corporate-strategy/sra-enforcement-strategy/]
  - the factors that should and should not be taken into account when considering whether to make a report to us, as detailed in our guidance on reporting and notification obligations
  - when conduct in litigation can give rise to a report to us, including SLAPPs
  - how to report a matter to us.
- Consider whether any further steps can be taken to help fee earners identify serious breaches to enable reports to be made promptly. This could include training, supervision, or a reporting policy.

Client onboarding

Why this is important

Concerns have been raised that some claimants may be using illicit funds to instruct law firms to engage in abusive litigation, including SLAPPs. Where this occurs, public trust in the legal profession can be seriously undermined and the integrity of the profession called into question.

Firms within the scope of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 (MLRs) must have robust client onboarding and due diligence processes. However, issues can arise because legal services such as litigation (including reputation management) fall outside the scope of the MLRs. Firms are not obliged in such circumstances to undertake money laundering checks on prospective clients, including source of funds/wealth checks.

What we expect

Even though litigation (including reputation management work) is generally outside the scope of the MLRs, firms still have a duty to identify the client (paragraph 8.1 of the Code of Conduct for individuals, paragraph 7.1 of the Code of Conduct for Firms and our guidance [https://contact.sra.org.uk/solicitors/guidance/identifying-client/]). Firms should also be aware of the risks of acting for a sanctioned client. All firms are subject to the Sanctions and Anti Money Laundering Act 2018 (Sanctions Regime), regardless of the types of services they offer. There is strict liability on behalf of the firm for any breach, though each firm can decide what actions to take to comply. However, where firms do not follow our guidance [https://contact.sra.org.uk/solicitors/guidance/financial-sanctions-regime/] , it may be considered as an aggravating factor in any enforcement action for any breach of the sanctions regime.

Carrying out identification, verification and sanctions checks at the outset of a matter are ways of making sure a firm is complying with these obligations.

Where a firm provides legal services in addition to litigation (for example, property or corporate advice) which fall under the MLRs, passporting is also a risk. This is where a client moves between departments and a particular matter may be drawn into the scope of the MLRs. For example, this might be where a reputation management client later instructs the firm on a house purchase. In such circumstances, firms must make sure that they comply with their obligations under the MLRs [https://contact.sra.org.uk/solicitors/resources-archived/money-laundering/] , including undertaking a client and matter risk assessment and source of funds/wealth checks where necessary.

What we found

Client due diligence

All firms we visited said they carried out some form of due diligence on all clients, including reputation management clients.

We consider it good practice for all firms acting on reputation management matters to supplement their initial client onboarding/due diligence checks with further enquiries. Obtaining detailed information about the client will help firms and solicitors safeguard against the potential of unwittingly acting for a sanctioned individual. It will also help identify any red flags surrounding the instructions themselves. It could also help firms protect their reputation given the recent high-profile nature and concerns surrounding SLAPPs and their funding.

Identification and verification

Of the 20 reputation management firms we visited, 17 provided legal services in scope of the MLRs. Three firms only did work (including litigation) which falls outside the scope of the MLRs. One of these firms said it did not undertake any AML checks for this reason. The others undertook client identification and verification checks.

On all but three of the files we reviewed, the client was identified and verified. The two firms that had conduct of these three matters explained they did not carry out identification and verification checks because litigation is outside of the scope of the MLRs.

Sanctions

All of the firms we visited said that they checked whether new clients are subject to sanctions. All but one firm said they also check existing clients against the sanctions

list on an ongoing basis. Firms used e-verification systems, checked the HM Treasury website and sanctions lists, and re-ran checks at regular intervals.

However, three firms did not have sanctions checks documented on the files we reviewed. In these cases, the firms decided that sanctions checks were not necessary because their clients were UK-registered charities, corporate entities, or celebrities.

It is important not to have a stereotyped view of what a sanctioned client might look like or be complacent with sanctions checks. Firms and solicitors should bear in mind that:

- a number of designated persons on the consolidated list hold British passports and have a last known address in the UK
- the sanctioned status of corporate entities depends not only on whether they themselves are designated, but also on whether they are owned or controlled by a designated person. This may not be immediately obvious and can be obscured by complex ownership structures.

As set out in our anti-money laundering annual report 2023 [https://contact.sra.org.uk/sra/research-publications/aml-annual-report-2022-23/] , our work also focuses on sanctions and the risk this poses to firms both inside and outside the MLR regulated sector. Our engagement included inspections, data collection and targeted guidance [https://contact.sra.org.uk/news/news/press/2024-press-releases/financial-sanctions-advice/] .

Source of wealth and source of funds checks

Half of the firms we visited said they carried out source of funds and source of wealth checks on reputation management clients despite not being obliged to. Of the 40 files we reviewed, source of funds checks were carried out in 14 matters and source of wealth checks were carried out in 16 cases. Those firms that did not carry out source of wealth and source of funds checks said this was because litigation matters are outside the scope of the MLRs. Eight firms told us that they carried out risk assessments on clients and matters. If the risk profile was heightened, they would carry out source of wealth and source of funds checks where necessary. We consider it good practice for firms to assess the risk of a matter and impose additional checks where appropriate.

Treating all reputation management matters as though they are within the scope of the MLRs might help identify clients who are funding matters through illicit means. At the outset of a reputation management matter, firms may consider it helpful to carry out a client and matter risk assessment. This could identify a need for source of wealth and source of funds checks, for example if the client is a politically exposed person or in a high-risk country. It would also identify any reputational or financial risks that the client might pose to the firm.

Case study

Firm C is a full-service law firm. When it is instructed on a reputation management matter, it treats it as if it falls within the scope of the MLRs. It carries out a risk assessment, client identification, verification and sanctions checks. It also carries out financial checks and searches for any negative press coverage. If there are any issues of concern, the risk profile is heightened and the matter is escalated to a senior partner for assessment. Source of funds and source of wealth checks are then carried out.

The firm has a policy on the types of clients that it is willing to act for and degree of risk that is acceptable to it. The firm has declined instructions from prospective

clients in reputation management matters in the past in accordance with this policy.

Checklist for firms/solicitors

- You must make sure you comply with your duty to identify the client (paragraph 8.1 of the Code of Conduct for individuals, paragraph 7.1 of the Code of Conduct for Firms and our guidance [https://contact.sra.org.uk/solicitors/guidance/identifying-client/]). This applies even if the matter is not within scope of the MLRs.
- You should also be aware of the sanctions regime and the risks it poses to your firm. Our guidance [https://contact.sra.org.uk/solicitors/guidance/financial-sanctions-regime/] sets out more information and ways to protect yourself. Be mindful not to have a stereotyped view of what a sanctioned client looks like or be complacent with sanctions checks.
- If you provide legal services within the scope of the MLRs, consider how you are mitigating the risks of passporting. Treating reputation management matters as though they are within the scope of the MLRs will mitigate this risk.
- Consider carrying out a client and matter risk assessment and source of funds/wealth checks on all matters. This may help to identify clients/matters which could adversely impact on the firm's reputation.

Instruction of public relations companies and private investigators

Why this is important

There are concerns that some public relations (PR) companies and private investigators (PIs) instructed by law firms in reputation management matters might be engaging in unethical and/or unlawful activity. There are also concerns that PR companies and PIs instructed by other parties (such as clients), who work alongside law firms, are carrying out these activities. This might include hacking, trespassing, illegal surveillance or publishing false statements. PR companies and PIs might also commission third parties to undertake work which is then performed illegally.

Where law firms contract with PR companies or PIs, they remain accountable for compliance with our Standards and Regulations for all work carried out by them on the law firm's behalf. It is therefore critical that firms have effective governance structures, arrangements, systems and controls in place to make sure anyone instructed to perform work on their behalf does so properly and lawfully.

Where PR companies and PI are instructed by other parties (such as clients), firms should be mindful of the risk of them acting illegally or unethically. Firms are responsible for their client's litigation strategy and must understand where the information they are using has come from and how it has been obtained.

Where a PR company or PI instructed by or working alongside a law firm engages in nefarious practices, the firm's reputation can be damaged and the reputation of the legal profession seriously undermined.

What we expect

When instructing a PR company or PI, we expect firms to comply with the following paragraphs in our Code of Conduct for Firms:

- Paragraph 2.1(c) – you have effective governance structures, arrangements, systems and controls in place that ensure that those you contract with do not

cause or substantially contribute to a breach of the SRA's regulatory arrangements
- Paragraph 2.3 – you remain accountable for compliance with the SRA's regulatory arrangements where your work is carried out through others, including those you contract with
- Paragraph 2.5 – you identify, monitor and manage all material risks to your business.

What we found

Use of PR companies and PIs

We wanted to understand why and the extent to which firms instructed PR companies and PIs in reputation management matters. We found that more firms instructed PIs on behalf of clients than PR companies. Eight firms said they had instructed a PR company, and 15 firms said they had instructed a PI. We reviewed seven files where a PR company was instructed and 17 files where a PI was instructed.

These reviews did not raise concerns about the services that PR companies and PIs were providing for the firms we visited. All of the firms that instructed PR companies asked them to manage potential reputational damage to the client. Sometimes PR companies helped with external communications (including speaking to journalists), strategy and advice. Two firms said the PR company promoted the client publicly.

Firms instructed PIs to trace people or assets, gather evidence, or to carry out computer forensics. Only one firm told us that it had instructed a PI for surveillance purposes, to gather evidence of unlawful confidentiality breaches. We saw surveillance in only one file we reviewed. The PI was authorised by the court to trace individuals who had defamed the client online.

Advice and consent

Solicitors must make sure that clients can make informed decisions about how their matter will be handled (Paragraph 8.6 of the Code of Conduct for individuals). Firms should therefore give the client information about the PR company or PI, the purpose and benefits of the instruction, and obtain their consent to instruct them.

All firms said that they would seek the client's written consent before instructing a PR company or PI. Only one firm said they did not know if they would provide the client with written advice on the scope, benefits and risks of the instruction of a PI. In our file reviews, written advice and client consent were given whenever a PR company was instructed.

However, where a PI was instructed, the client was advised in writing about the instruction on 13 out of 17 files. Written client consent was given on 15 out of 17 files. On the four files where written advice was not given, and the two where there was no written client consent given, firms told us that advice had been given and consent obtained verbally.

We were generally satisfied that firms were providing advice and obtaining client consent on instructing PR companies/PIs. However, we encourage firms to record all advice and consents in writing. This gives clarity and certainty.

Reporting unlawful or improper conduct

In our file reviews, we did not see evidence of unlawful or improper conduct by a PR company or PI. However, one firm had previously suspected that their opponent had hired a PI to obtain evidence illegally. Their client reported this matter to the police. The client also reported the opponent's firm to us for their suspected involvement. We are investigating this matter.

Most firms (16) said that if a PR company or PI had acted unlawfully or improperly, they would report the matter to their compliance team to consider further action.

Written policy and letter of instruction

Only two firms that instructed PR companies and one firm that instructed PIs had a written policy on managing the instruction. Most firms said they did not have a written policy or standard process because they rarely instructed PR companies or PIs. However, instructing third parties can bring regulatory risks. A written policy can help fee earners understand their obligations when instructing PR companies or PIs, the risks that arise and how to mitigate them.

Only two firms had a template letter of instruction/terms of engagement for instructing PR companies. Only three firms had one for instructing PIs. Firms sent a letter of instruction to the PR company or PI on only eight of the 24 files we reviewed where a PR company or PI was instructed. Some firms said they did not send a letter of instruction as they used the written proposal from the PR company or PI as the basis for the retainer (see further below).

Almost all firms said they would ask the PR company or PI to provide a written proposal. Most firms said this would need to set out the scope of the instruction and methods to be used. Not all firms said that they would expect the proposal to state that the instructions must be performed lawfully. Furthermore, only some firms said they would expect the proposal to cover any third parties instructed by the PR company or PI. The file reviews we carried out confirmed this.

Where PR companies and PIs commission third parties to carry out the work that a firm has instructed them to do, firms will remain accountable for compliance with our Standards and Regulations. It is therefore important that firms and solicitors take appropriate steps to mitigate the risks of unlawful or improper conduct by PR companies, PIs and any third parties they may instruct. To help firms comply with their regulatory obligations and protect their reputation, we consider it good practice for firms to have:

- a template letter of instruction/terms of engagement setting out the scope of the instruction, working practices, and legal/regulatory obligations that the PR company or PI must comply with
- a written policy setting out the governance systems and controls in place when instructing a PR company or PI.

Both should cover the arrangements with any third parties the PR companies or PIs may instruct. This could include preventing PR companies or PIs from instructing third parties without express consent of the firm and/or client.

We have provided a checklist of issues to cover in a letter of instruction and written policy at Annex 2.

Governance systems and controls

All firms that instructed a PR company or PI had some governance systems in place to make sure that:

- the PR company or PI was acting in compliance with the firm's regulatory obligations
- their independence and ability to act in the public interest was not compromised by the PR company or PI.

None of the firms received financial benefits from instructing a PR company or PI.

Our file reviews showed that almost all firms reviewed the material produced by the PR company or PI and most firms maintained regular contact with them. Six firms only took one but not both of these steps. Both of these measures are important to help make sure that the PR companies or PIs are carrying out their work appropriately.

Firms and solicitors should consider taking additional steps to make sure they have effective governance structures, arrangements, systems and controls in place when instructing PR companies and PIs. These include the following measures, which were taken by a small number of firms:

- having strict terms of engagement to make roles and responsibilities clear
- informing the PR company or PI of their regulatory obligations
- reviewing the performance of the PR company or PI as appropriate.

It is also crucial that firms and solicitors make sure they have systems and controls in place so that any third parties instructed by a PR company or PI do not cause or substantially contribute to a breach of our regulatory arrangements. We were therefore concerned to see that only some firms took the following measures:

- reviewing the arrangements between the PR company and any third parties they instructed
- reviewing any material produced by third parties instructed by the PI
- preventing PR companies or PIs from instructing third parties without appropriate consent.

Firms and solicitors should consider taking the above steps to mitigate the risks of a PR company or PI instructing third parties who then undertake unlawful or improper activity. The arrangements around third parties instructed by the PR company or PI should be clearly stated in the firm's written policy and template letter of instruction/terms of engagement.

Due diligence

All firms that instructed a PR company or PI carried out some form of due diligence on them. However, the methods were mostly informal, including:

- meeting or speaking to them
- online research to check their profile and reputation
- gaining feedback from colleagues
- only using established companies/individuals.

Most firms said they selected the PR company or PI based on their previous experience of them. Many firms had longstanding working relationships with the PR companies/PIs they instructed, trusting that further checks were unnecessary.

On the files we reviewed, none of the firms carried out more formal due diligence on the PR company/PI. They did not perform any of the following checks:

- financial/solvency
- criminal/Disclosure and Barring Service records

- reviewing industry recognised accreditations or qualifications (for example from the Association of British Investigators, Public Relations and Communications Association or Chartered Institute of Public Relations)
- considering relevant training and professional skills
- reviewing any insurance cover in place and whether it is appropriate and adequate.

Only two firms checked if the PI was a member of a trade association. While this does not provide a cast-iron guarantee of ethical practice, membership is usually only granted after assurances have been made around maintaining standards. Few firms checked if the PR company or PI could hold information securely and put in place arrangements to make sure client information was appropriately safeguarded. This is critical to making sure that client information remains confidential (Paragraph 6.3 of the Code of Conduct for Firms, Paragraph 6.3 of the Code of Conduct for Solicitors). Firms and solicitors should check that PR companies and PIs have adequate data protection arrangements in place.

We have provided a checklist of suggested due diligence checks at Annex 2.

To make sure a PR company or PI is competent and compliant, firms and solicitors might find it helpful to select:

- a PI who is a member of the Association of British Investigators (ABI), which is endorsed by the Law Society
- a PR company who is accredited by the Public Relations and Communications Association (PRCA) or Chartered Institute of Public Relations (CIPR).

These bodies require members to comply with codes of conduct that align with our Standards and Regulations. The ABI also requires its members to have many of the items on our checklist of suggested due diligence checks.

Instruction of PR companies and PIs by clients

Some firms had experience of working alongside PR companies or PIs directly instructed by their clients. We reviewed 10 files where the client directly instructed a PR company and one file where the client directly instructed a PI. On four files, the firm had introduced the PR company or PI to the client.

Most firms said they would not carry out any due diligence on the PR company or PI. This was because the PR company/PI had already been instructed by the client before the firm had been engaged. Some form of due diligence was done on only four of the files we reviewed. Few firms met with or spoke to the PR company or PI or checked their profile and reputation. On most of these files, the firms reviewed the material produced by the PR company or PI and had regular contact with them.

Where a firm or solicitor has not directly instructed a PR company or PI, they should still be mindful of the potential for illegal or unethical activity to be undertaken by them. Firms and solicitors are responsible for their client's litigation strategy and have a primary duty as officers of the court. Therefore they must understand where the information they are using has come from and how it has been obtained.

When working alongside the PR company or PI, firms and solicitors must also maintain their independence. They should carefully consider what measures are needed to make sure they comply with their regulatory obligations.

Case study – written policy and letter of instruction

Firm D instructs PIs on behalf of clients in reputation management matters. It has a detailed written policy on instructing PIs. This includes key issues that fee earners should consider when instructing them. The policy also includes template provisions that should be included in any letter of instruction. These provisions cover:

- the scope of the work to be undertaken
- the lawful basis for the work. The PI must only use methods that are compliant with all relevant laws and regulations
- anti-bribery measures. The PI must not take part in bribery in the course of their work
- confidentiality, which should be maintained where client information is shared
- conflicts of interest. The PI must confirm the parties to be investigated so that the firm can carry out conflict checks and give approval for the work to go ahead
- financial interest. The PI must confirm that they and any third party they instruct do not have a financial interest in the matter
- sub-contracting work to third parties. The PI cannot sub-contract work to third parties without express approval from the firm. If they do sub-contract without the firm's approval, the PI must warrant that the third party will comply with all of the PI's obligations.

All letters of instruction to PIs and third parties must be reviewed and approved by the firm's in-house legal department before they can be sent out.

Checklist for firms/solicitors

- Consider putting in place a written policy about the instruction and use of PR companies and PIs. Check that it covers the issues listed in Annex 2 (where applicable), and that staff are adhering to it.
- Make sure you have advised the client fully on instructing a PR company or PI and obtained the client's consent to do so to make sure it does not cause the client problems. To maintain clarity and certainty, all advice and consents should be recorded in writing.
- Carry out due diligence on the PR company or PI to make sure they are competent and compliant with the relevant regulatory obligations. This could include the checks listed in Annex 2.
- Consider using a template letter of instruction/terms of engagement when instructing a PR company or PI. Check that it covers the issues listed in Annex 2 (where applicable).
- Throughout the course of instruction, take steps to make sure that:
  - the PR company or PI is acting appropriately and lawfully
  - any third parties instructed by the PR company or PI are acting appropriately and lawfully
  - you can maintain your independence and comply with your regulatory obligations while working with the PR company or PI.

Training and competence

Why this is important

Reputation management can be a complex and challenging area of work. Matters can be time-sensitive, high-pressured and contentious. It is important that firms and solicitors carry out their instructions competently. This includes being able to identify and avoid abusive conduct such as SLAPPs. Training is a key component in making sure that solicitors maintain high professional standards and comply with their regulatory obligations.

In our conduct in disputes thematic review [https://contact.sra.org.uk/sra/research-publications/conduct-disputes/] , we identified that there was room for improvement in this area.

What we expect

We expect solicitors to provide a competent service and keep their professional knowledge and skills up to date. Firms should have systems in place to make sure that managers and employees are competent to carry out their roles. Our Competence Statement [https://contact.sra.org.uk/solicitors/resources-archived/continuing-competence/cpd/competence-statement/] , Code of Conduct for Solicitors [https://contact.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/] , and Code of Conduct for Firms [https://contact.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/] set out the general obligations that all solicitors and firms have to maintain competence.

We also expect firms and solicitors handling reputation management work to understand and comply with our Warning Notice [https://contact.sra.org.uk/solicitors/guidance/slapps-warning-notice/] and guidance on conduct in disputes [https://contact.sra.org.uk/solicitors/guidance/conduct-disputes/] .

What we found

Competence

During our file reviews, we looked at various parts of the litigation process, including:

- how firms assessed the merits of a claim and potential defences
- remedies sought
- identification of relevant parties
- the right to reply process
- the issue of proceedings.

Overall, we did not have concerns about the competence of firms and fee earners we visited when handling reputation management work.

However, we are mindful that all firms we visited carry out relatively significant amounts of reputation management work. Several heads of department told us that where they do see claims with little or no merit, these tend to come from firms with little or no expertise in reputation management matters. We encouraged firms to report such instances to us.

Reputation management is a specialist area of law. Firms and solicitors must satisfy themselves that they have the necessary competence to act in this area and if they do not, they should decline to do so.

Training

Overall, we found a good standard of training on SLAPPs, conduct in disputes, source of funds and source of wealth checks. Following our earlier conduct in disputes thematic review, we identified that there was room for improvement in this area. In this recent SLAPPs thematic review, we found that the firms and solicitors we visited were doing more to make sure they are competent and complying with our Standards and Regulations. Again, while accepting both reviews had small sample sizes, firms had a good level of understanding on source of wealth/funds checks which was being applied in practice (see section on source of wealth/funds checks under 'client onboarding' for more details).

Most fee earners (15) and heads of department (17) had received training on SLAPPs. Most of the fee earners (14) and heads of department (16) also confirmed this training covered our warning notice. The fee earners and heads of department who did not receive training on SLAPPs nonetheless had a good understanding of our warning notice. They had also received training on conduct in disputes and source of wealth/funds checks.

All fee earners and heads of department had received training on:

- conduct in disputes. Many of the fee earners (12) and heads of department (16) said this training covered our guidance on conduct in disputes.
- source of wealth and source of funds checks.

Most of the training on SLAPPs, conduct in disputes and source of wealth and source of funds checks took place in the last six months to a year. Training on SLAPPs and conduct in disputes was mostly internal and informal. This included supervision, one-to-ones, team meetings, discussions with colleagues, and knowledge sharing within the team. This was not surprising as reputation management work is a complex and specialist area, often partner-led and carried out by small teams. Some fee earners attended external seminars and conferences and many attended online webinars.

Most fee earners (14) and heads of department had received no training on instructing and working with PR companies or PIs. Only three heads of department received training on instructing PR companies and only four on instructing PIs. Where fee earners and heads of department received training, this was in the context of wider training on instructing third parties or SLAPPs.

We found firms that instruct PR companies and PIs could do more to make sure that they are acting appropriately and lawfully (see section on 'Instruction of PR companies and PIs' for more details). Firms should consider providing training to fee earners in this area. This will help fee earners understand the risks when instructing third parties and take appropriate steps to mitigate them.

Examples

We saw several examples of effective training and knowledge sharing at the firms we visited. Some examples include:

- using the warning notice as a basis for training on SLAPPs
- maintaining an internal knowledge bank accessible to all (for example, firm intranet) which includes:
    - our warning notice
    - our guidance on conduct in disputes
    - relevant case law
    - recommended PR companies and PIs
    - guidance on instructing PR companies and PIs, including risks and best practice
    - template letter of instruction/terms of engagement for instructing PR companies and PIs
- having open communication channels for team/department members (for example, Microsoft Teams, WhatsApp groups, mailing lists) where case law updates, policies and guidance are shared on an ongoing basis
- having regular team/departmental meetings (for example, weekly, monthly) to discuss key issues, case law, policies and guidance
- inviting external speakers to give training on relevant issues at team/departmental meetings

- requiring individuals to complete anti-money laundering training at regular intervals, including source of wealth and source of funds checks
- fee earners subscribing to content from relevant sources (for example, Lexis, PLC) and sharing relevant updates with the team
- individuals attending external conferences and sharing knowledge with team members who could not attend.

Checklist for firms/solicitors

- Make sure that all fee earners are and remain competent to work in this area. They should have an adequate and up-to-date understanding of relevant law, policy and practice. This includes our warning notice and our guidance on conduct in disputes.
- Fee earners undertaking litigation work should receive training on conduct in disputes and SLAPPs. Training should be tailored and appropriate to the circumstances and the needs of the firm and fee earners.
- If the firm instructs or works alongside PR companies or PIs, consider providing training, resources and/or templates to fee earners. Make sure that they are aware of the risks, best practice and their regulatory obligations in this area.
- Check that fee earners can demonstrate they meet our continuing competence requirements - for example, by recording their learning and development activities.

Further information and resources

Report a solicitor

If you think you might have been targeted by potential abusive litigation you should read our advice [https://contact.sra.org.uk/consumers/problems/fraud-dishonesty/legal-threats-solicitor/] on this. You can report the solicitor to us [https://contact.sra.org.uk/consumers/problems/report-solicitor/] so we can consider what further action to take.

Want to know more

We published a warning notice on SLAPPs [https://contact.sra.org.uk/solicitors/guidance/slapps-warning-notice/] .

We have produced guidance on conduct in disputes [https://contact.sra.org.uk/solicitors/guidance/conduct-disputes/] , as well as making sure the profession is aware of the impacts of Russian sanctions. [https://contact.sra.org.uk/home/hot-topics/financial-sanctions-international-issues/]

Further issues about litigation of this type are also explored in our risk report [https://contact.sra.org.uk/sra/research-publications/balancing-duties-litigation/] .

We have also produced advice for those who might be targeted by SLAPPs [https://contact.sra.org.uk/consumers/problems/fraud-dishonesty/legal-threats-solicitor/] so they can recognise typical tactics.

If you require further assistance or have any queries, please contact the Professional Ethics helpline [https://contact.sra.org.uk/contactus/] .

Annexes

Open all [#]

Annex 1: Sample information and our approach

Sample

Given the concerns around SLAPPs, funding and the instruction of PR companies and PIs, we visited firms that:

- provide legal services in reputation management matters (typically matters relating to defamation and privacy)
- have instructed a PR company and/or PI.

To make sure we received a range of views, we visited both claimant and defendant firms. Three of the firms we visited specialised in disputes and/or investigations work only.

Firms were identified using the following sources:

- our conduct in disputes thematic review [https://contact.sra.org.uk/sra/research-publications/conduct-disputes/]
- internal data held on firms
- a survey sent to a sample of 100 firms (based on litigation turnover) to understand the reputation management work they carried out, who they act for (claimant, defendant or both) and the extent to which they have instructed PR companies/PIs
- online research
- desk based reviews
- webinars, articles and the government's consultation response.

We also interviewed five in-house media lawyers. They were selected from desk-based reviews and online searches.

Our approach

We did not visit firms where we are currently investigating the possible use of SLAPPs or abusive litigation. We do plan to include such firms in any future reviews of this area once these investigations have concluded.

Interviews

At each firm we spoke with a partner/the person with overall responsibility for reputation management matters ('head of department'), and also spoke to a more junior fee earner doing reputation management work to better understand how matters were handled by members of the team. Two of the firms we visited did not have a more junior fee earner for us to interview. In total, we spoke to 20 heads of department and 18 fee earners.

File reviews

At each firm we also reviewed two files in relation to reputation management matters. We therefore reviewed 40 files in total.

Annex 2: Instructing PR companies and PIs

Issues to include in a written policy

- When and how to instruct a PR company or PI (including approvals required)
- Receiving and retaining financial benefits

- Managing conflicts of interest
- Confidentiality and sharing client information
- Data protection arrangements
- Unlawful/improper conduct by the PR company or PI
- Anti-bribery measures
- Instruction of third parties by the PR company or PI
- Raising concerns and reporting misconduct.

Suggested due diligence checks

- Profile and reputation
- References
- Criminal/Disclosure Barring Service records
- Solvency and financial probity
- Information Commissioner's Office registration
- Professional indemnity insurance
- Association of British Investigators membership (for PIs)
- Public Relations and Communications Association or Chartered Institute of Public Relations accreditation (for PR companies)
- Training in and understanding of relevant legislation and regulations (for example Data Protection Act 2018, GDPR, Human Rights Act 1998, Editors' Code, Defamation Act 2013, Communications Act 2003, SRA Standards and Regulations)
- ISO 27001 accreditation (for information security management)
- BS102000 certification (for the provision of investigative services)
- Experience of working within legal proceedings (including giving evidence in Court)
- Training in the latest technologies and techniques

Issues to include in a template letter of instruction/terms of engagement

- Scope of the instruction
- Costs of the instruction
- Working practices that will be used (must be lawful/ethical)
- Unacceptable practices
- Confidentiality and sharing of client information
- Data protection arrangements
- Instruction of third parties by the PR company or PI
- Managing conflicts of interest
- Financial benefit
- Compliance with SRA Standards and Regulations
- Compliance with relevant legislation and regulations
- Legal professional privilege.