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Paul Philip
Chief Executive
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By email: [REDACTED]

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Dear Paul

SLAPP and purported confidential letters before claim

I am a solicitor, and the founder of Tax Policy Associates: a not-for-profit company which aims to improve both the tax system and the public understanding of tax.

I am writing to raise an important matter of public interest relating to Strategic Lawsuits against Public Participation (SLAPP) - the bringing or threatening of proceedings to discourage public criticism or action. I very much welcome the recent SRA guidance on SLAPP, and the fact the SRA has taken a clear stand on what is an increasingly important problem (and one which I'm pleased to say is soon to be the subject of legislation).

A well-known feature of SLAPP is that the firms involved send correspondence to attempt to pressure individuals and organisations to withdraw claims they have made. I have recently discovered that a common tactic is for the firms to assert that this correspondence is "without prejudice" and/or confidential, and to threaten (unspecified) serious consequences if it is published or disclosed to third parties, or indeed if the mere existence of the correspondence is disclosed.

I have recent experience of receiving letters of this kind - please see copies of the correspondence, and an explanation of the background, at <https://taxpolicy.org.uk/letters>.

In my case, and I believe in most SLAPP cases, the assertion that the letters were "without

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prejudice” and “confidential”, and cannot be published, is plainly incorrect as a matter of law. This is for the following reasons:

- An assertion that a letter is confidential does not make it so. As a general matter it will rarely be the case that an (unsolicited) letter before claim will be confidential; the information in the letter will probably be publicly known (and therefore not confidential information). Even if confidential information is included, it is unlikely the recipient of the letter can be said to have assumed a duty of confidence. Furthermore, in many SLAPP cases there will be a public interest in disclosure which would override any duty of confidence (if it did exist).
- The “without prejudice” doctrine applies to negotiations genuinely aimed at settlement. It does not apply to correspondence which simply sets out a client’s case. Nor does it apply to a communication where a party asks for a concession but does not offer one (see the House of Lords decision in *Bradford & Bingley v Rashid*). For these reasons, an unsolicited letter which asserts a libel claim, and requires the recipient to withdraw the alleged libel, will not usually be “without prejudice”.
- Even where a letter is “without prejudice”, the doctrine is a rule governing the admissibility of evidence, not a rule preventing publication. It may often be unwise for a party to publish “without prejudice” correspondence (because a judge could regard that as an attempt to admit what would otherwise be inadmissible), but there is no rule of law or professional practice preventing publication.

Paragraph 1.4 of the Code of Conduct states:

“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)”

An assertion that a letter is confidential, when it is not, is misleading. An incorrect assertion of “without prejudice” is misleading, as is the (also incorrect) assertion that the “without prejudice” doctrine prevents communication of correspondence to third parties. And it is certainly misleading to claim there is any rule of law that prevents disclosure of even the existence of the correspondence. It is therefore improper for a solicitor to make these assertions.

There is a more fundamental point: the solicitors’ profession should uphold the rule of law with independence, honesty, and integrity. Intimidating potential defendants into not publicising the very fact they are potential defendants goes directly against these principles.

I would also draw your attention to the recent article on this subject by Professor Richard Moorhead (<https://lawyerwatch.wordpress.com/schrodingers-threats/>).

I would therefore ask the SRA to update its SLAPP guidance to specifically refer to the practice of attempting to prevent the publication (or mentioning) of letters asserting potential libel claims (and “reputation management” letters which claim not to be libel claims). I would also ask that

SRA guidance specifically caution against assertions of confidentiality or “without prejudice” which do not have a firm legal basis.

Please note that I do not wish to make a complaint about Osborne Clarke or the individual solicitors involved in the correspondence to which I refer. My sole intention is to change future behaviour.

Yours sincerely

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(SRA ID 195038)