

Table 5.3. *Duty not to abuse the court process*

A central principle behind all dispute resolution is the concern that the parties use the dispute-resolution process to solve exactly what they say is in dispute and nothing more. When lawyers are acting for clients who have differences with each other, they are concerned to try to identify the core of the disagreement between their clients. Most lawyers quickly realize that they will do a better, less expensive job for their client (and perhaps be paid earlier) if they try to get to the bottom of an argument – often through mediation – and settle it without going to court. If they are good at resolving problems because they decide to focus on central rather than peripheral issues, they develop reputations for being cost-efficient. These are successful people because they are so efficient. This is why effective negotiators and mediators ask their clients about underlying tensions, about wider issues and about business strategies before they attempt a negotiation or mediation. This principled or interest-based approach^a can go into what might really be behind a dispute and solve it before courts or tribunals need to be involved.

But when a party or their lawyer is not prepared to genuinely expose what lies beneath and is concerned to use a court argument as a smokescreen for an underlying and usually illegal purpose, then the truth is obscured and in effect, a deception is practised on the court and the justice system. There are several varieties of abuse here: they include making baseless allegations or to assist an improper purpose such as revenge, to pursue a truly hopeless case^b or simply to waste the time, money and energy of the other party for commercial reasons.

Courts struggle to identify such abuse for two reasons. First and foremost, they rely on lawyers to inform them about what is going on in a case. This is particularly true in common law jurisdictions like Hong Kong where an adversarial system is adopted. If we choose not to let a judge know about what is really happening, they may never actually know how to manage the case. If they do develop a sense of an underlying problem by listening to witnesses, they may not be certain about what to do about it if they think we, as lawyers, are misleading them and may go on doing so.

Courts must decide between competing viewpoints as to what are presumed to be genuine legal claims and need lawyers to put forward evidence as to what is really at stake in such claims. Such evidence will be irrelevant or inherently unreliable if it is proposed in support of objectives that are illegal or at best immoral. When a judge has to deal with this type of abuse and cannot rely on us, their own experience and judgment is all that they have available, and some will inevitably misjudge the situation.

Second, court time is expensive, especially in Hong Kong. The salaries of judges and court administrators, not to mention the time and fees of the party who is being deceived and their lawyers, will typically run into hundreds of thousands

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of Hong Kong dollars. If a case is delayed or even fails entirely because there are attempts by one party or their lawyer to use it for some immoral purpose, a great deal of money is thrown away. Abuse of the court process undermines wider society's respect for the rule of law and the capacity of governments to pay for the court system. This is particularly true in the case of Hong Kong where legal costs are highest in Greater China.

In Chapter 2 (Table 2.1, p. 31) we related the 2013 case of a Hong Kong defence lawyer in an indecent assault case who deliberately delayed the trial in order to earn more fees. He pretended he would be on vacation and needed an adjournment and wasted the Court's time by questioning witnesses unnecessarily; he also insulted a witness and showed discourtesy to the court. A trial that would normally only take two or three days took 19 days and lasted for nearly four months.

In this matter, the motive was simple greed, but there are also other more complex motives for abuse of process.

Abusing the court process – scenario

You are a new lawyer and want to concentrate on commercial clients, because the world of finance is interesting. You are approached by another law firm and asked to provide advice to one of that firm's commercial clients, EverBuild, a development company from Portugal that develops casinos in Macau SAR. EverBuild has run into big trouble with their debts and need to find time to pay a [legitimate] multimillion RMB debt. They want your help to delay paying a major creditor, a construction company that had built a casino for EverBuild for Macau SAR and wants to be paid. EverBuild plans to sue the construction company for fraud on likely unsustainable grounds, simply to gain time. They know the fraud claims will probably fail, but don't care. All they want is time, so that they can transfer the remaining assets of the company out of Macau SAR and into Portugal, and accordingly, they are resistant to any mediation.

You warn EverBuild that the case will be very hard to win, but you are offered the prospect of work and migration to the EU if you draft the court documents making the claim of fraud against the construction company.

What should you do?

Virtue ethics

The duty of a lawyer not to abuse the process of dispute resolution is based on the virtues of *honesty* and *transparency*. To the extent that we seek out the truth in the judicial process, we are seeking *knowledge* of the real purposes of litigation. Accurate information is needed to make a judgment based on legal principles

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rather than on ulterior purposes. If transparency is lacking and courts are used to help avoid legitimate obligations through false assertions, or even to settle scores or gain political advantages through true assertions, then *justice* fades away.

Confucian teaching

A Confucian lawyer would accept that a legitimate court system deserves *respect*, in the same way that legitimate rulers deserve respect. In the interests of *harmony*, they would therefore avoid disrespect of the court and call out efforts to abuse the established process of dispute resolution.

Consequentialism

Lawyers who know that a commercial claim is legally weak or hopeless but pursue it within the umbrella of traditional role morality to the point of false allegations, must either be lacking in any moral purpose or be very clear in their own minds that there are at least some arguable points and that the desired outcome is morally worthwhile. But they cannot in conscience invoke zealous advocacy in this civil environment in support of the abuse. In the end they must be willing to provide an acceptable justification. It is hard to see how consequentialism justifies such spurious allegations in the world of commerce.

Consequentialism, moral activism and responsible lawyering are in closest alignment when this issue of the public interest is present, though who is defining the public interest is often important.

Kantian ethics

Kantian views in relation to the purpose of litigation can lead a lawyer in several directions, depending on the understanding of fairness adopted. On the one hand, a Kantian lawyer might consider that every case should first be mediated or would otherwise benefit from alternative dispute resolution, in the interests of everyone's equal right to avoid the judicial process. But if litigation is inevitable, they are likely to condemn any proceedings that hide their real purpose, particularly purely commercial purposes, since these proceedings will not be fair to those who seek to defend themselves. The right to a fair trial, so stated, will be at the top of a Kantian list.

Occasionally, however, when a client is perceived as undeserving, then Kantian approaches may give way to consequentialist calculations as to who among the litigants is more worthy. Kantian insistence on fair process no matter who is involved is an admirable reminder to lawyers that one of our critical roles is to guarantee fairness for undesirable clients, regardless. It is this quality of Kant

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that has captured many lawyers' hearts more firmly and more commonly than has consequentialism, even if few use this terminology.

Applicable law and Bar Association conduct rules regarding the abuse of process

... *relevant to the proposition that the merit of a civil case is subject to the condition that the parties' motives are proper and focused only on the truth or otherwise of the facts and the applicability of the law to those facts.*

There is no direct international principle or rule directly prohibiting or preventing the abuse of process in civil proceedings, but the International Bar Association's *International Principles on Conduct for the Legal Profession*, 2019, Principle 5, *Clients' Interests*, states: 'A lawyer shall treat client interests as paramount, subject always to there being no conflict with the lawyer's duties to the court and the interests of justice, to observe the law, and to maintain ethical standards.'

Across Greater China, there are clear professional conduct rules prohibiting abusive court actions.

PRC	HKSAR	Taiwan
<p>All China Lawyers Association, <i>Codes of Profession Conduct for Lawyers</i>, 2018</p> <p>Article 6: No lawyer shall ... by using his or her identity as a lawyer, incite, abet or organize an interest group in interrupting or breaking the normal social order. . .</p> <p>Article 7: A lawyer shall be honest, faithful, diligent, devoted to his or her duties, protect the client's <i>legitimate</i> rights and interests according to the facts and laws [emphasis added]. . .</p>	<p><i>Code of Conduct of the Bar of The Hong Kong Special Administrative Region</i>, 2018.</p> <p>10.29: A practising barrister has an overriding duty to the Court to act with candour and independence in the interests of justice.</p> <p>10.30: A practising barrister must not knowingly deceive or mislead the Court. . .</p> <p>10.32: In all cases it is the duty of a practising barrister to guard against being made the channel for questions or statements which are only intended to insult or annoy either the witness or any other person or otherwise are an abuse of Counsel's function. . .</p>	<p><i>Attorney Regulation Act</i>, 2010.</p> <p>Article 28: An attorney shall not engage in fraudulent or beguiling acts towards their client, the court, prosecution agencies or judicial police.</p> <p>— — —</p> <p>Taiwan Bar Association <i>Code of Ethics for Lawyers</i>, 2009.</p> <p>Article 23: When performing his/her duties, a lawyer may not engage in any intentional act of concealment or deception, and he/she may not fabricate or alter</p>

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<p>Article 46: No lawyer or law firm shall take advantage of providing legal services as an expedient for seeking the rights and interests that are disputed by the parties.</p>	<p>s10.41 allows a barrister ‘... in cross-examination which goes to a matter in issue, [to] put questions suggesting fraud, misconduct or the commission of a crime if he is satisfied that the matters suggested are material to his client’s case and he has no reason to believe that they are only put forward for the purpose of impugning the witness’s character’.</p>	<p>evidence, instigate perjury or engage in other intentional acts of obstructing the discovery of the truth.</p>
<p>Article 79: A lawyer who falls under any of the following circumstances shall be deemed to have committed an act of unfair competition in the practice of law: ... 6. explicitly or implicitly stating that the lawyer is able to help clients achieve improper goals or reach clients’ goals by improper methods or means.</p>	<p>s10.42 (a): ‘Questions which affect the credibility of a witness by attacking his character, but which are otherwise not relevant to the actual inquiry, may not be put in cross-examination unless there are reasonable grounds to support the imputation conveyed by the questions.’</p>	<p>Article 31: A lawyer may not ... accept a client’s appointment and, if he/she has already been appointed, the appointment shall be terminated: 1. He/she is expressly aware that the client’s purpose behind the legal actions adopted, the defences submitted, or the assertions made in the course of litigation is merely to threaten, or maliciously injure another person.</p>
<p>The All China Bar Association, <i>Rules on the Handling of Criminal Cases by (Defence) Lawyers</i>, 2017, although only applicable to criminal cases, contain a detailed set of behavioural</p>	<p>Law Society of Hong Kong, <i>The Hong Kong Solicitors’ Guide to Professional Conduct</i>, Principles of Professional Conduct 1.01: ‘A solicitor shall not, in the course of practising as a solicitor, do or permit to be done on his behalf anything which compromises or impairs or</p>	<p>Article 39: When safeguarding a client’s legitimate rights, a lawyer may not intentionally engage in acts of defaming, vilifying, or injuring the adversary.</p>

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requirements for defence lawyers; but none refer to the need for proper motives in representing a defendant. However, some other rules are indirectly relevant.	is likely to compromise or impair – (a) his independence or integrity; . . . (d) his own reputation or the reputation of the profession; . . . or (f) his duty to the court.’
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<i>Lawyers’ Law of the People’s Republic of China</i> (2017 Amendment)	
Article 2: A lawyer shall maintain the legal rights and interests of a client, maintain the correct enforcement of law, and maintain the social fairness and justice.	1.03: Conduct subject to discipline a solicitor is an Officer of the Court (see section 3(2) of the Legal Practitioners Ordinance (Cap.159)), and should conduct himself appropriately.
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Notice of the Supreme People’s Court and the Ministry of Justice on <i>Lawfully Protecting Lawyers’ Rights in Proceedings and Regulating Lawyers’ Participation in the Trial Activities</i> , 2018	5.14: Rules of professional conduct to be observed
1. . . . a presiding judge or sole judge may. . . stop . . . opinions issued that [are] irrelevant to a case	It is an implied term of a retainer that a solicitor is under a duty, at all times, to observe the rules of professional conduct. [Commentary – This means that there will be limitations upon the freedom of a solicitor to do what his client wants him to do. A solicitor must not breach the principles of professional conduct in order to benefit his client.]
	5.02: Breach of law or professional misconduct
	A solicitor must not act or continue to act where to do so would involve him in a breach of law or in professional misconduct.

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or insulting, defaming or threatening others, or those intentionally disrupting the order of the court.	[Commentary 3 – A solicitor must not act or continue to act where to do so would amount to an abuse of process.] 10.02: The duty of a solicitor A solicitor must treat the court with courtesy and respect and must represent his client resolutely, honourably and within the limits of the law. 10.03: Duty to court A solicitor must never knowingly attempt to deceive or participate in the deception of a court. 10.07: Courtesy A solicitor should at all times be courteous to the court, to all witnesses and to those engaged on the other side.
----- All China Law Association, <i>Code of Conduct for Lawyers to Promote Business</i> , 2018 Article 10: When conducting business promotion, a lawyer or law firm shall not. . . 3. expressly or implicitly have a special relationship with judicial organs, government authorities, social organizations, intermediaries and their staff. Article 13: . . . Lawyers and law firms may not cooperate with third parties to conduct business promotion in the form of payment of case introduction fees and share of income from legal fees.	[Commentary – 1. Legal contempt of court and the professional obligation outlined here are not identical, and a consistent pattern of rude, provocative or disruptive conduct by a solicitor, even though unpunished as contempt, might well merit disciplinary action. . . . 3. A solicitor must not make or instruct a barrister to make an allegation which is intended only to insult,

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	degrade or annoy the other side, a witness or any other person.
4.	This Principle also prohibits a solicitor from making or instructing a barrister to make an allegation which is scandalous. . .
6.	A solicitor should not, in a plea in mitigation, make or instruct a barrister to make an allegation which is likely to vilify or insult any person, without having first satisfied himself that there are reasonable grounds for making the statement.
7.	A solicitor must observe the correct etiquette in court at all times and must refrain from inappropriate conduct or discourteous behaviour during the course of a hearing before the court]
11.01:	Duty to act in good faith
	A solicitor must act towards other solicitors with frankness and good faith consistent with his overriding duty to his client.

Conclusion in relation to abusive civil proceedings

Abuse of process is abusive of the trust a court places in its lawyers and undermines their integrity in the eyes of the community. A cynical

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consequentialism drives such lawyers, though some consequentialists draw on noble virtues of compassion and of a great desire for justice.

The consequentialist nature of abuse of process is clearer in the case of purely corporate and commercial disputes, but abusive proceedings undertaken for other purposes are no different in principle. Lawyers who are willing to use the courts in this way are deceiving and belittling them as a means to achieve what may well in some cases be a greater end, but even if driven virtuously, such lawyers need to know that they may be sacrificing some of another virtue – their integrity – in the process.

^a See, generally, Michael King, Arie Freiberg, Becky Batagol and Ross Hyams, *Non-Adversarial Justice*, Federation Press, Sydney, 2009.

^b Lawyers still need to distinguish ‘hopeless’ from ‘weak but arguable’ cases. This is frequently difficult to do, particularly if the culture of their employment or the weight of the law firm partnership behind them has a bias towards regarding all matters as arguable in the sense identified by Judge Rakoff (see Chapter 3). Strictly understood, if a case is hopeless (that is, has no chance of success), you should advise your client not to proceed to court.