

The Crowdfunded Litigator's Code

Funding legal work through the contributions of litigants' supporters is nothing new. Legal 'fighting funds' and 'war chests' have been a feature of many single issue campaigns and part of unions' and NGOs' armoury for years. Crowdfunding using internet platforms such as CrowdJustice is primarily an updating of means, rather than a new model.

CrowdJustice has been remarkably successful because it is transparent, user-friendly, accessible and well-resourced. For the most part (around 85%) of campaigns, the money raised has been relatively small, but vital to cover, or supplement, the costs of legal advice, making representations, or straightforward legal claims. A small minority of CrowdJustice campaigns have raised funds to help with the costs of judicial review claims and interventions and to cover some of the associated costs exposure.

This class of crowdfunded case is the main focus of Joe Tomlinson's thought-provoking paper, *Crowdfunding Public Interest Judicial Reviews: A Risky New Resource and the Case for a Practical Ethics* [2019] P.L. January. Joe identifies several of the difficulties that can arise in crowdfunded litigation and the "need to devise a coherent practical ethics of crowdfunding in this context". I agree this is necessary, but not with the suggestion that the Solicitors Regulation Authority ('SRA') and Bar Standards Board ('BSB') should take the lead in developing a new ethical code. Read purposively, perhaps with some supporting guidance, their existing standards should be sufficient. What follows seeks to demonstrate that, drawing on colleagues' and my own experience of handling a series of crowdfunded cases both before CrowdJustice and other platforms were established¹ and, and more recently, using those platforms.² As in Joe's paper, the main focus is on judicial review litigation, though the basic principles will be relevant to many other litigated cases.

Crowdfunding is not for every case, but money can sometimes be raised in this way to enable helpful advice to be funded, straightforward cases to be taken forward and

¹ E.g. *R (EMAG) v HM Treasury* [2009] EWHC 2495 (Admin), *R (Eisai Ltd) (Alzheimer's Society & Shire Ltd, Interested Parties) v. the National Institute for Health and Clinical Excellence* [2007] EWHC 1941 (Admin). LSC 'community contributions' were crowdfunded for in *R (Bailey v London Borough of Brent* [2011] EWCA Civ 1586 and *R (Harris) v London Borough of Haringey* [2010] EWCA Civ 703.

² E.g. the junior doctors' case, *R (Justice for Health Ltd) v Secretary of State for Health* [2016] EWHC 2338 (Admin), and the Pigney and others intervention in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5.

even to support important public interest litigation when this would not otherwise happen, promoting access to justice. In public interest cases, where larger sums may need to be raised, there will need to be a sufficiently large, identifiable group who either might benefit from a case themselves or want to fund it because they support a cause or for other altruistic reasons. Lawyers who take on such cases need to think carefully about how their ethical and professional duties - not only to their clients, but also to the public, other parties and the Court - apply in this unusual situation. The best resources of the crowdfunded litigator are not the funds raised by crowdfunding, but their own honesty, reliability and integrity. These should never be squandered.

With that in mind, consider these suggestions as to your conduct, preparation for, and attitude during crowdfunded litigation:-

1. Be committed and accountable

Commitment to the client, and to ensuring their interests are protected,³ is critical. Legal advice will often need to be given at a stage where future payment is uncertain (so given either *pro bono* and understood to be such by the client, or supported by a carefully worded retainer explaining what will be charged at each stage⁴). Claims may need to be issued to protect clients' positions,⁵ especially given the normal judicial review 'promptly and within three months' time limit and the tighter time limits in special contexts like planning and procurement.

Crowdfunded work also demands a special degree of accountability of lawyers, not only to their clients, but also to funders with whom there is no direct or contractual relationship. This often calls for more time, effort and creativity than in conventionally-funded cases.

2. Understand the risks and give proper advice about them

As in all litigation, crowdfunded claims involve risks that lawyers, especially solicitors, need to appreciate, plan for and properly advise on at the outset of the case and reassess as the case progresses. That advice needs to be confirmed in writing.

Most importantly, if careful thought is not given to costs protection in litigated cases, and clear advice given, clients may end up exposed to unanticipated liabilities which their solicitor should have warned them about.⁷

³ Solicitors Regulations Authority ('SRA') Code of Conduct, Principle 7 and standard 4.2; Bar Standards Board ('BSB') Handbook, Core Duty C2 and Outcome gC11.

⁴ SRA Code, Standards 8.6 and 8.7; BSB Handbook Outcome C18.

⁵ SRA Code, Principles 1 and 7, Standards 3.2 and 3.4.

⁷ SRA Code, Standards 8.6 and 8.7.

There are other risks besides. The sums that can be raised through crowdfunding are inherently uncertain;⁸ clients should be advised about that. Necessary and sometimes urgent work will sometimes not end up being remunerated, particularly in judicial review claims, so what will be done and on what basis needs to be communicated clearly. Occasionally, unfulfillable promises are made in crowdfunding campaigns to support legal work, even after solicitors are instructed and named. Some funders may not understand how their position differs from that of the client. Group clients may not have sufficiently clear arrangements for taking decisions, especially if they are an unincorporated association.⁹

3. Engage from the start

One of the most important ways a crowdfunded solicitor can help address these risks is to engage fully from the planning stages of a crowdfunding campaign onwards, even though there may be no money available to pay for their advice at that time. This helps ensure clients' decisions are properly informed ones,¹⁰ including as regards how much money will be needed at each intermediate stage and to see cases through to their conclusion.¹¹ Input into campaigns, especially the text of website 'pitches', will help ensure cases and what might be achieved is described realistically. Advice can be given about cases, or points, that are not properly arguable and so should not be brought.¹² Thought can be given to the time frame for funding, what can realistically be raised and when. In group cases, the means of taking instructions and making decisions can be clarified.

4. Identify the client/s clearly

Only very rarely (e.g. an unincorporated membership association), will all funders in crowdfunded cases also be clients. Otherwise, funders need to understand they are not clients and will have no control over the case, even though they may have useful ideas to contribute (funders with control and something tangible to gain may be 'maintainers' and so potentially exposed on costs, though those with neither ought to be categorised as 'pure funders'¹³). Crowdfunded money is held on behalf of clients and, subject to the terms of e.g. CrowdJustice, must be properly accounted for and is

⁸ *R (Hawking) v Secretary of State for Health and Social Care* [2018] EWHC 989 (Admin), §20.

⁹ SRA Code, Standard 3.1.

¹⁰ SRA Code, Standard 8.6.

¹¹ SRA Code, Standard 8.7.

¹² SRA Code, Standard 2.4. BSB Handbook C92(b).

¹³ *Hamilton v Al-Fayed (Costs)* [2002] EWCA Civ 665.

theirs to control.¹⁴ It follows that in group client cases, those instructing the solicitor need to be clearly identified, as do decision-making mechanisms.¹⁵

5. Identify the ‘crowd’ and work out how to reach them

Established membership organisations and networks generally find it easier to crowdfund than individuals litigating for the first time, as do organisations and individuals with high profiles in conventional and social media. Crowdfunding campaigns for litigation cases fail when there is no invested group of this kind and means of identifying and reaching other potential funders, of whom only a small proportion will ever be willing to contribute even where funders stand to benefit tangibly if the case succeeds. Publicity in the media can drive interest in a crowdfunding campaign.

6. In litigation cases, start by planning for costs protection, then for funding case-progressive work

Having to pay opponents’ legal costs is generally the greatest risk and barrier to access to justice in public law cases¹⁶ and so this risk is a critical one to confront in any crowdfunded litigation case.

In all cases, clients should be advised on the normal rules on costs in civil litigation, what their exposure may be and how it might be reduced,¹⁷ including by seeking a cost capping order or public funding¹⁸ (note, crowdfunding is sometimes used to make a ‘community contribution’ to costs in a Legal Aid case, which will mean qualified protection for the Legal Aid recipient).

In all cases, thought needs to be given to raising enough money to cover likely exposure as well as meeting the costs of the crowdfunded solicitor, barristers, any experts and other costs.¹⁹ Needless to say, clients’ interests must always come first.

¹⁴ SRA Code, Standard 4.1.

¹⁵ SRA Code, Standard 3.1.

¹⁶ See e.g. Hickman, *Public Law’s Disgrace* <https://ukconstitutionallaw.org/2017/02/09/tom-hickman-public-laws-disgrace/> and *Review of Civil Litigation Costs: Supplemental Report*, Chapter 10 <https://www.judiciary.uk/wp-content/uploads/2017/07/fixed-recoverable-costs-supplemental-report-online-2-1.pdf>

¹⁷ SRA Code, Standard 8.7.

¹⁸ SRA Code, Standard 8.7.

¹⁹ SRA Code, Standard 8.7.

7. Communicate honestly with the public

Crowdfunded clients, like all others, are entitled to confidentiality,²⁰ but crowdfunded lawyers may need to explain what is happening to funders and the public. Anything a crowdfunded lawyer says about a case on instructions should, obviously, be honest and not, in any way, mislead the Court²¹ or take unfair advantage of third parties including actual and potential funders.²² Anything short of that could undermine the trust the public places in solicitors²³ or barristers.²⁴ Crowdfunding does not in any way diminish the duty to advise a client on their case's merits, nor on the risks of some public interest litigation being characterised as non-justiciable 'politics by another means' (a risk that may be higher in crowdfunded cases²⁵). Of course, some crowdfunded public interest litigation may fail in the lower courts, only to succeed spectacularly on appeal.²⁶

So, although clients can say what they wish in crowdfunding campaigns, crowdfunded solicitors should advise them on what is sensible to say and what not to say insofar as it has a bearing on the risks the client faces and impacts on how the case will be perceived and defended. Crowdfunding campaigns should never contain untrue, hateful or defamatory statements about individuals or groups. The public, who are all potential funders in a crowdfunding campaign, should never be misled. Exaggerated claims should never be made about what a case will, or might, achieve because funders' expectations will then, inevitably, be unrealistic. Where there is a change of strategy, ideally this should be explained to funders.

8. Be as open and transparent as clients' interests allow

Only those who stand to benefit from a change of policy, practice or the law that a case may prompt may gain something at the conclusion of a case; most funders will receive nothing tangible during the life of a crowdfunded public law case.

What crowdfunded clients and solicitors can offer funders is information, such as regular 'insiders updates', case papers, opponents' case papers (either with opponents' agreement or because they are made public by the Court) and information about attending public hearings. Care should be taken to avoid disclosing information that is confidential to the parties and the Court, however.

²⁰ SRA Code, Standard 6.3; BSB Handbook, Core Duty 6, Rule C15.5.

²¹ SRA Code, Principle 5, Standard 1.4; BSB Handbook, Rule C3.

²² SRA Code, Standard 1.2; BSB Handbook, Rule C9 prohibits "knowingly or recklessly mislead[ing] or attempt[ing] to mislead anyone.

²³ SRA Code, Principle 2.

²⁴ BSB Handbook, Core Duties C3 and C5, Outcome C5.

²⁵ E.g. *Wilson v Prime Minister*. *Wilson v Prime Minister* [2019] EWCA Civ 304, §56.

²⁶ E.g. *Wightman and others v Secretary of State for Exiting the European Union* [2018] CSH 62.

Unless there are very good reasons not to keep funders up to date, or clients instruct this should not happen, funders should be made aware broadly of what is happening and how their money is being used. Common courtesy demands nothing less and funders who are updated will often continue to fund a case when needed.

9. Be ready to explain what became of a crowdfunded case

Unless a client instructs otherwise, it is always helpful to explain to funders, and ideally publicly, how and why a crowdfunded case has come to an end and what was achieved. Whenever possible, explain how crowdfunded money has been spent in enough detail that a reasonable funder will be satisfied it has been used responsibly. All of this helps maintain public confidence in the integrity of lawyers who handle such cases.

10. Know the law and the relevant professional standards

There is little published about crowdfunding litigation, so read everything that has been. Carefully read CrowdJustice's Terms and Conditions,²⁷ unused funds policy²⁸ and their lawyers' guide.²⁹ Read Tomlinson's *Crowdfunding Public Interest Judicial Reviews: A Risky New Resource and the Case for a Practical Ethics* [2019] P.L. January.³⁰

On costs exposure, read CPR Part 46.2 and the leading case on maintenance and who is a 'pure funder', *Hamilton v Al-Fayed (Costs)* [2002] EWCA Civ 665.

On the Court's ability to lift the corporate veil when it comes to costs in cases that benefit company directors with something to gain, read *Goodwood Recoveries v Breen* [2005] EWCA Civ 414.

If you are a solicitor, reread the SRA's Code with your client's crowdfunded case in mind. Read the Law Society's excellent Practice Note on what clients should be told in writing.³¹ On solicitors' duties to third parties and the public, read the SRA's sobering 2018 report, *Balancing of duties in litigation*.³² If you are a barrister, reread Part 2 C of the Bar Standards Board Handbook.

²⁷ <https://www.crowdjustice.com/terms-and-conditions/>

²⁸ <https://support.crowdjustice.com/case-owners/for-lawyers/what-happens-if-we-have-money-leftover-at-the-end-of-the-case>

²⁹ <https://www.crowdjustice.com/downloads/uk-lawyer-guide-gated/>

³⁰ Downloadable at:

https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3257787_code2240968.pdf?abstractid=3257787&mirid=1

³¹ <https://www.lawsociety.org.uk/support-services/advice/practice-notes/client-care-letters/>

³² <http://www.sra.org.uk/documents/solicitors/freedom-in-practice/balancing-duties-in-litigation.pdf>

On cost capping orders, read sections 88 and 89 of the Criminal Justice and Courts Act 2015, Part D, Chapter 24 of the Administrative Court: Judicial Review Guide 2018³⁴ and Part 4 of *Judicial Review and The Rule of Law*.³⁵ Read *R (Hawking) v Secretary of State for Health and Social Care* [2018] EWHC 989 (Admin), *R (Lumsdon) v Legal Services Board* [2015] EWCA Civ 421, *R (Beety) v Nursing and Midwifery Council* [2017] EWHC 3579 (Admin) and *R (We Love Hackney) v LB Hackney* [2019] EWHC 1007 (Admin). Don't forget the old PCO cases, especially *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192, *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 and *R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp.* [2008] EWCA Civ 1209. They are all still important.

And if you encounter a tricky problem – and you will - pick up the phone and call the Public Law Project (020 7843 1260), CrowdJustice, the Law Society ethics help line (0370 606 2577), the SRA (0370 606 2555) or Bar Standard Board (020 7611 1307) as needed. Make a good note of their advice.

Last, don't be deterred from taking on crowdfunded cases because they need to be handled carefully. If you are, important cases will not be brought that should be and access to justice will suffer.

Good luck with your client's crowdfunded case.

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³⁴ Downloadable at:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/727626/Admin_Court_JRG_2018_content_v3_web.pdf

³⁵ <https://2bqk8cdew6192tsu41lay8t-wpengine.netdna-ssl.com/wp-content/uploads/2015/10/Judicial-Review-and-the-Rule-of-Law-FINAL-FOR-WEB-19-Oct-2015.pdf>