

Warning notice

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Use of non disclosure agreements (NDAs)

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Updated 12 November 2020 (Date first published: 12 March 2018)

Scope of the warning notice

This warning notice covers the use of non-disclosure agreements (NDAs) and we use this term to include any form of agreement or contract, or a clause within a wider agreement or contract, under which it is agreed that certain information will be kept confidential.

The guidance is relevant to all NDAs regardless of the context in which the NDA arises – we have seen examples of concerning clauses in employment matters, as well as disputes involving negligence claims and commercial transactions.

It applies whether you are acting on behalf of a client, for your own firm in your capacity as an employer or for yourself. It includes the terms or proposed terms of the NDA and your conduct in handling the matter.

Our concerns

We recognise that NDAs are often legitimately used to protect commercial interests, reputation and confidentiality. NDAs can operate to the mutual benefit of both parties to the agreement.

This warning notice and the SRA's Standards and Regulations [<https://www.sra.org.uk/solicitors/standards-regulations-resources/>], do not prohibit the use of NDAs. However, we are concerned to ensure that NDAs are not used to prevent reporting to us, other regulators and law enforcement agencies or making disclosures which are protected by law. We are also concerned to ensure that those we regulate do not take unfair advantage of the other party when dealing with NDAs.

This warning notice provides a reminder of some of the key issues and risks that you should be aware of when dealing with NDAs and highlights your professional obligations. When we use the term 'dealing with' NDAs in this notice, we are referring to negotiating, drafting, advising on, enforcing or being a party to an NDA.

Status

Whilst this guidance does not form part of the SRA Standards and Regulations [<https://www.sra.org.uk/solicitors/standards-regulations-resources/>] , we may have regard to it when exercising our regulatory functions.

Who is this guidance relevant to?

This guidance is relevant to everyone we regulate, for example:

- managers and employees of law firms
- those responsible for managing human resources and complaints in law firms
- practitioners dealing with NDAs, including in house lawyers acting for their internal client.

The SRA Principles

Failure to report a serious breach of our regulatory requirements or other wrongdoing or criminal conduct, by you or your firm, or improperly using NDAs, may put you in breach of one or more of the SRA Principles [<https://www.sra.org.uk/solicitors/standards-regulations/principles/>] set out below. These require you to act:

Principle 1: in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice

Principle 2: in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons

Principle 3: with independence

Principle 5: act with integrity.

The Principles are applicable in your practice and when you are acting in a personal capacity, although certain Principles will be less relevant in this context. For example, Principle 3, acting with independence, is unlikely to apply when you are acting on your own behalf.

The SRA Standards and Regulations

Where you are acting for a client in a matter which involves an NDA, you should have regard specifically to the paragraphs in the SRA Code of Conduct for Solicitors, RELs and RFLs and the Code of Conduct for Firms set out below:

- You do not abuse your position by taking unfair advantage of clients or others: paragraph 2 of the Code of Conduct for Solicitors, RELs and RFLs



and paragraph 1.2 of the Code of Conduct for Firms

- You cooperate with the SRA, other regulators, ombudsmen, and those bodies with a role overseeing and supervising the delivery of, or investigating concerns in relation to, legal services: paragraph 3 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 3.2 of the Code of Conduct for Firms
- You do not attempt to prevent anyone from providing information to the SRA or any other body exercising regulatory, supervisory, investigatory or prosecutory functions in the public interest: paragraph 7.5 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 3.10 of the Code of Conduct for Firms
- You report promptly to the SRA, or another approved regulator, as appropriate, any facts or matters that you reasonably believe are capable of amounting to a serious breach of their regulatory arrangements by any person regulated by them (including you) of which you are aware: paragraph 7.7 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 3.9 of the Code of Conduct for Firms:

Please see our guidance on Reporting and notification obligations [<https://www.sra.org.uk/solicitors/guidance/reporting-notification-obligations/>] for further information on when you should make a report to us.

Our expectations

We expect you to act in accordance with your professional obligations as set out above when dealing with NDAs.

Any attempt to prevent a person from complaining or providing information to us will be a failure to meet our Principles and Standards, as described above. A practitioner who uses an NDA improperly or behaves in a way that is in breach of these requirements is at risk of disciplinary action.

Your duty to act in the best interest of your client does not override your professional obligations to uphold the proper administration of justice, act in a way that maintains public trust and confidence, and to act with independence and integrity. If your client's instructions are to act in a way that is inconsistent with our requirements, you will need to consider whether you can continue to act for them.

We consider that NDAs would be improperly used if you sought to:

- use an NDA as a means of preventing, or seeking to impede or deter, a person from:
 - co-operating with a criminal investigation or prosecution
 - reporting an offence to a law enforcement agency
 - reporting misconduct, or a serious breach of our regulatory requirements to us, or making an equivalent report to any other body responsible for supervising or regulating the matters in question



- making a protected disclosure under the Public Interest Disclosure Act 1998.
- use an NDA to influence the substance of such a report, disclosure or co-operation
- use an NDA to prevent any disclosure required by law
- use an NDA to prevent proper disclosure about the agreement or circumstances surrounding the agreement to professional advisers, such as legal or tax advisors and/or medical professionals and counsellors, who are bound by a duty of confidentiality
- include or propose clauses known to be unenforceable
- use warranties, indemnities and clawback clauses in a way which is designed to, or has the effect of, improperly preventing or inhibiting permitted reporting or disclosures being made or example, asking a person to warrant that they are not aware of any reason why they would make a permitted disclosure, in circumstances where a breach of warranty would activate a clawback clause.

NDAs or other terms in an agreement which contains an NDA, must not stipulate or give the impression to the person expected to agree the NDA, that reporting or disclosure as set out above is prohibited.

In dealing with NDAs, we expect you:

- to use standard plain English and to make sure that the terms are clear and relevant to the issues and claims likely to arise
- to be clear in the NDA what disclosures can and cannot be made and to whom
- to provide clear advice to your client about the terms of the NDA to help ensure that there is no confusion about what is or is not permitted. Confirming such advice in writing may help the individual bringing the claim if issues arise at a later date and may also help you if a concern is later raised about your role in advising on the NDA
- if the agreement is or forms part of a settlement agreement under the Employment Rights Act 1996, to ensure that you are aware of the requirements governing those agreements, including for the employee to be in receipt of independent advice.

Duty not to take unfair advantage

Taking unfair advantage of an opposing party, whether unrepresented or represented by a lawyer, professional adviser, litigation friend, intermediary or other third party, would result in a breach of your professional obligations. This would include:



- taking advantage of an opposing party's lack of legal knowledge or where they have limited access to legal representation or advice, for example proposing or including a clause which you know to be unenforceable, or threatening to litigate upon such a clause
- applying undue pressure or using inappropriate aggressive or oppressive tactics in your dealings with the opposing party or their representative, for example, imposing oppressive and artificial time limits on a vulnerable opposing party to agree the terms of the NDA
- seeking to rely on your position as solicitor as a means of exerting power over the opposing party, for example, by discouraging them from taking legal advice
- preventing someone who has entered into an NDA from keeping or receiving a copy.

Where the opposing party is vulnerable or unrepresented, your obligations to make sure there is no abuse of position, or unfair advantage taken, will be heightened.

Enforcement action

Failure to comply with this warning notice may lead to disciplinary action.

Other sources of help

SRA Reporting and notification obligations

[<https://www.sra.org.uk/solicitors/guidance/reporting-notification-obligations/>] .

SRA resources on the use of non-disclosure agreements

[<https://www.sra.org.uk/solicitors/resources/diversity-toolkit/sexual-harassment/>] .

Law Society practice note The Use of non disclosure agreements

[<https://www.lawsociety.org.uk/support-services/advice/practice-notes/non-disclosure-agreements-and-confidentiality-clauses/>] .

Further help

For guidance on conduct issues, contact the Professional Ethics helpline

[<https://www.sra.org.uk/contactus/>] .