

Warning notice

Use of non-disclosure agreements (NDAs)

Issued on 12 March 2018 | Updated 25 November 2019

Our concerns

We recognise that NDAs, including with employees, can legitimately be used to protect commercial interests and confidentiality and in some circumstances, to protect reputation. Such agreements can operate to the mutual benefit of both parties. This warning notice, and the SRA's Standards and Regulations [\[solicitors/standards-regulations-resources/\]](#), should not be taken to prohibit the use of NDAs. However, we are concerned to ensure that you do not:

- use NDAs in circumstances in which the subject of the NDA may, as a result of the use of the NDA feel unable to notify the SRA or other regulators or law enforcement agencies of conduct which might otherwise be reportable
- fail to notify the SRA of misconduct, or a serious breach of our regulatory requirements, by any person or firm: including wrongdoing by the firm, or harassment or other misconduct towards others such as employees or clients
- use NDAs as a means of improperly threatening litigation or other adverse consequences, or otherwise exerting inappropriate influence over people not to make disclosures which are protected by statute, or reportable to regulators or law enforcement agencies.

This warning notice provides a reminder of some of the key issues and risks that you should be aware of.

Status

Whilst this guidance does not form part of the SRA Standards and Regulations [\[solicitors/standards-regulations-resources/\]](#), we may have regard to it when exercising our regulatory functions. This warning notice is additional to previous warning notices and does not replace them.

Who is this guidance relevant to?

This guidance is relevant to everyone we regulate, and in particular:

- managers and employees of law firms
- those responsible for managing human resources and complaints in law firms
- practitioners advising clients on the use of NDAs.

This note highlights your obligations if your firm is considering an NDA with someone who has complained. It also sets out your obligations when advising clients on NDAs with individuals (usually the client's current or former partners or directors, employees or workers, collectively referred to in this note, for ease of reference, as "employee" or "employees").

The SRA Principles

Inappropriate use of NDAs, failure to report actual or suspected misconduct, or other wrongdoing or criminal conduct, by you or, when acting on behalf of a client, improperly proposing, or exerting inappropriate influence on a third party to enter into an NDA either in an

inappropriate manner or with inappropriate content; or failure to report wrongdoing that is subject to an NDA may put you in breach of one or more of the SRA Principles [solicitors/standards-regulations/principles/] set out below, that is, you 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 SRA Standards and Regulations

In dealing with NDAs, you should have regard specifically to the relevant paragraphs in the 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 1.2 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 7.3 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.

Our expectations

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:
 - 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
 - reporting an offence to a law enforcement agency
 - co-operating with a criminal investigation or prosecution.
- use an NDA to influence the substance of such a report, disclosure or co-operation
- use an NDA as a means of improperly threatening litigation against, or otherwise seeking improperly to influence, an individual in order to prevent or deter or influence a proper disclosure

- prevent someone who has entered into an NDA from keeping or receiving a copy.

NDA's or other settlement terms must not stipulate, and the person expected to agree the NDA must not be given the impression, that reporting or disclosure as set out above is prohibited. It may be appropriate for the NDA itself to be clear about what disclosures are not prohibited by the NDA.

Where you find, or have grounds to believe, that a member of your firm has or may have committed a serious breach of our requirements, we expect you to report such findings or concerns to us. We may wish to investigate and we have statutory powers that are not available to you. Failure to report may be a failure to meet paragraph 7.7 of the Code of Conduct for Solicitors, RELs and RFLs [[/solicitors/standards-regulations/code-conduct-solicitors/](#)] and paragraph 3.9 of the Code of Conduct for Firms [[/solicitors/standards-regulations/code-conduct-firms/](#)] and may result in a breach of one or more SRA Principles [[/solicitors/standards-regulations/principles/](#)]. Please see our guidance on reporting and notification obligations for further information on when you should make a report to us [[/solicitors/enforcement/solicitor-report/other-solicitor-results/](#)].

Any attempt to prevent a person from complaining or providing information to us will be a failure to meet the requirements of paragraph 7.5 of the Code of Conduct for Solicitors, RELs and RFLs and Paragraph 3.10 of the Code of Conduct for Firms, by way of example, entering into an agreement which would attempt to preclude us from investigating any actual or potential complaint or allegation of professional misconduct. A practitioner who proposes or uses an NDA or behaves in some other way that is in breach of our requirements is at risk of disciplinary action.

You may also be at risk if you use improper threats of litigation or improperly influence a party by reference to other adverse consequences of making such report or disclosure.

Inappropriate or disproportionate threats, including a threat of defamation proceedings where such a claim is known to be unsustainable¹ [[#n1](#)], may well involve serious breaches of the Principles or Codes of Conduct. These are likely to breach our requirements, including Principle 1 and 2. Taking unfair advantage of an opposing party's lack of legal knowledge where they have not instructed a lawyer) is an aggravating feature of such conduct.

Where the employee is not represented, your obligations will be heightened, to ensure that there is no abuse of position, or unfair advantage taken.

If the agreement is or forms part of a settlement agreement under the Employment Rights Act 1996, you should ensure that you are aware of the requirements governing those agreements, including for the employee to be in receipt of independent advice. You will also need to ensure that the NDA does not include clauses known to be unenforceable.

Enforcement action

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

Other sources of help

SRA Risk paper Walking The Line: The balancing of duties in litigation [[/risk/resources/balancing-duties-litigation.page](#)].

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 [\[contactus\]](#).

Notes

1. Huda v Wells [2017] EWHC 2553 QB at paras 57 to 67 provides a recent analysis of the defence of absolute privilege as it applies to referrals to statutory regulatory bodies.