

## **Warning notice**

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## **Status**

This warning notice will help you understand your professional obligations and how to comply with them. We will have regard to it when exercising our regulatory functions.

## **Purpose**

This warning notice provides a reminder of some of the key issues and risks that those dealing with non-disclosure agreements (NDAs) need to be aware of.

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.

## **Scope of this warning notice**

This warning notice covers the use of NDAs. 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.

This warning notice is relevant to all NDAs regardless of the context in which the NDA arises – for example, we have seen their use in relation to employment matters, as well as in disputes involving negligence claims and commercial transactions.

This warning notice applies if you are dealing with the terms or proposed terms of an NDA and your conduct in handling the matter. It also applies if the agreement is not a standalone or standard NDA.

## **Who is this warning notice relevant to?**



This warning notice is relevant to everyone we regulate and who might deal with an NDA, 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.

It applies:

- whether you are acting on behalf of a client, for your own firm in your capacity as an employer or for yourself
- even if all parties to an NDA are legally represented
- whether an NDA involves individuals or companies.

## Your regulatory obligations

Neither this warning notice nor our [Standards and Regulations](https://higher-rights.sra.org.uk/solicitors/standards-regulations/) [https://higher-rights.sra.org.uk/solicitors/standards-regulations/] prohibit the use of NDAs.

However, where you are acting for a client in a matter which involves an NDA, you should have specific regard to the following paragraphs in the [SRA Code of Conduct for Solicitors, RELs and RFLs](https://higher-rights.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/) [https://higher-rights.sra.org.uk/solicitors/standards-regulations/code-conduct-solicitors/] and the [Code of Conduct for Firms](https://higher-rights.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/) [https://higher-rights.sra.org.uk/solicitors/standards-regulations/code-conduct-firms/]:

- **you do not abuse your position by taking unfair advantage of clients or others:** (see heading further below and paragraph 2 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 1.2 of the Code of Conduct for Firms)
- **you co-operate with the SRA, other regulators, ombudsmen, and those bodies with a role in overseeing and supervising the delivery of, or investigating concerns in relation to, legal services:** (see 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:** (see paragraph 7.5 of the Code of Conduct for Solicitors, RELs and RFLs and paragraph 3.11 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:** (see 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 also see our guidance on [Reporting and Notification obligations](https://higher-rights.sra.org.uk/solicitors/guidance/reporting-notification-obligations/) (<https://higher-rights.sra.org.uk/solicitors/guidance/reporting-notification-obligations/> - for further information on when you should make a report to us).

## **The SRA Principles**

Failure to comply with these regulatory obligations or other wrongdoing or criminal conduct, by you, your firm or another firm, or improperly using NDAs, may also put you in breach of one or more of the SRA Principles.

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.

Your duty to act in the best interests 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 these obligations, you will need to consider whether you can continue to act for them.

## **Our concerns**

We are particularly concerned to ensure that NDAs are not used to prevent reporting to us or to other regulators and law enforcement agencies or to prevent disclosures which are protected by law.

We therefore 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
- making any disclosure required by law



- making a 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.

NDA's must not include or propose clauses known to be unenforceable or use warranties, indemnities, and claw back clauses in a way which is designed to, or has the effect of, improperly preventing or inhibiting permitted reporting or disclosures being made. For 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 claw back clause.

NDA's 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.

Any attempt to prevent a person from complaining or providing information to us will be a breach of your regulatory obligations. A practitioner who uses an NDA improperly or behaves in a way that is in breach of their regulatory obligations is at risk of disciplinary action by us.

### **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 party to agree the terms of the NDA
- seeking to rely on your position as a 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.

When dealing with NDA's we expect you to act in accordance with your professional obligations. This includes:



- using standard plain English and making sure that the terms are clear and relevant to the issues and any claims that might arise
- being clear in the NDA what disclosures can and cannot be made and to whom
- providing clear advice to your client about the terms of the NDA to help make sure that there is no confusion about what is or is not permitted. Confirming such advice in writing might help the individual bringing the claim if issues arise at a later date and might 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, making sure that you are aware of the requirements governing those agreements, including that an employee is in receipt of independent advice.

## **Improving how you deal with NDAs**

Our [Thematic Review into the use of NDAs](https://higher-rights.sra.org.uk/sra/research-publications/thematic-review-nda/) [https://higher-rights.sra.org.uk/sra/research-publications/thematic-review-nda/] highlighted specific issues to be considered by firms and those dealing with NDAs to help ensure full compliance with their regulatory obligations.

### **Is an NDA needed?**

NDAs should not be used routinely. From the outset firms and clients should consider carefully if an NDA is necessary given the specific circumstances of the case. This is highlighted in the Acas guidance on [settlement agreements](https://www.acas.org.uk/settlement-agreements/) [https://www.acas.org.uk/settlement-agreements/].

### **Training**

Firms should ensure that all those dealing with NDAs have adequate support and training on the issues covered in this warning notice.

### **Over-reliance on precedents/templates**

Those dealing with NDAs should make sure that they do not become over-reliant on NDA templates and complacent about the risks. Templates should always be specifically tailored to the individual circumstances of each case.

### **Time limits**

Whether you are acting for an employee or employer, you should always consider 'pushing back' on unreasonable time limits. Any time limits should always allow you sufficient time to properly take instructions, advise and respond.

## **Funding and your duty to your client**

Employers typically make contributions towards employees' legal costs.

You are required to act in your client's best interests. This includes being very clear with your client from the outset about the potential limitations of the advice you can offer them because of any funding constraints.

Whatever the level of funding, clear advice should always be given to the client about what the NDA does and does not permit them to do. A record of the advice provided should be kept.

## **Reporting concerns**

Reporting concerns is key to maintaining public trust in the profession. In the first instance concerns about, for example, an unethical or unenforceable clause in an agreement with an NDA should be raised with the other side so that it can be resolved.

Solicitors and firms should [report any serious concerns](https://higher-rights.sra.org.uk/solicitors/guidance/reporting-notification-obligations/) [https://higher-rights.sra.org.uk/solicitors/guidance/reporting-notification-obligations/] so that they can be investigated.

## **Other sources of help**

- SRA [Thematic Review into the use of NDAs](https://higher-rights.sra.org.uk/sra/research-publications/thematic-review-nda/) [https://higher-rights.sra.org.uk/sra/research-publications/thematic-review-nda/]
- SRA [Reporting and notification obligations](https://higher-rights.sra.org.uk/solicitors/guidance/reporting-notification-obligations/) [https://higher-rights.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/) [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/) [https://www.lawsociety.org.uk/support-services/advice/practice-notes/non-disclosure-agreements-and-confidentiality-clauses/].

For guidance on conduct issues, contact the [Professional Ethics helpline](https://higher-rights.sra.org.uk/contact-us/) [https://higher-rights.sra.org.uk/contact-us/].