Solicitors Regulation Authority

SRA response

Confidentiality clauses: measures to prevent misuse in situations of workplace harassment or discrimination

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Introduction

Read the confidentiality clauses: measures to prevent misuse in situations of workplace harassment or discrimination consultation [https://www.gov.uk/government/consultations/confidentiality-clauses-measures-to-prevent-misuse-in-situations-of-workplace-harassment-or-discrimination]

The Solicitors Regulation Authority (SRA) is the regulator of solicitors and law firms in England and Wales. We work to protect members of the public and support the rule of law and the administration of justice. We do this by overseeing all education and training requirements necessary to practise as a solicitor, licensing individuals and firms to practise, setting the standards of the profession and regulating and enforcing compliance against these standards. We are the largest regulator of legal services in England and Wales, covering around 80% of the regulated market. We oversee some 194,000 solicitors and around 10,400 law firms.

We welcome the opportunity to respond to this consultation.

Our response

Question 1: Do you have any examples of confidentiality clauses, in employment contracts or settlement agreements, that have sought to cloud a worker's right to make a protected disclosure, or overstretch the extent to which information is confidential? If so, please describe these.

We have seen a range of clauses in the matters that we are investigating in relation to the alleged improper use of confidentiality clauses in settlement agreements. The clauses involved in the settlement agreement between Zelda Perkins and Miramax/ Harvey Weinstein are already in the public domain and have been provided by Ms Perkins and published as part of the Women and Equalities Select Committee inquiry.

Examples of some of the clauses we have seen during our investigations include clauses which:

- permit disclosures only where they are 'required' by law (rather than where a party wishes to make a disclosure to an appropriate body

such as a regulator)
- require documents to be held only by a party's solicitors, for specified purposes (rather than by one of the parties to the agreement)
- restrict a party's ability to participate in criminal or other proceedings or deter them from taking part in those proceedings.

Question 2: In your view, should all disclosures to the police be clearly excluded from confidentiality clauses? Why?

We have made it clear in our Warning notice [https://contact.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/] on the use of non-disclosure agreements (NDAs) that NDAs drafted by solicitors should not prevent people from reporting concerns to law enforcement agencies, which would include the police. Our warning notice states:

"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
  - 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 cooperation
- 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."

Any attempt to prevent a person reporting wrongdoing to the police is likely to breach one or more of the SRA Principles, in particular, Principles 1, 2 and 6 in the SRA Handbook [https://contact.sra.org.uk/solicitors/handbook/handbookprinciples/] .

We would agree that this should apply to all NDAs, not just those drafted by solicitors.

Question 3: What would be the positive and negative consequences of this, if any?

We consider that there is a clear public interest in disclosures being made to the police because it may assist with the prosecution of crime and the prevention of further harm.

Requiring clarity on this is likely to be helpful since it will prevent opaque clauses which deter reporting to the police. It will also assist if an employee is considering their position some time later, when they may have forgotten the advice they received at the time.

Solicitors drafting confidentiality clauses in this way would be complying with the SRA Principles and the Code of Conduct, thus upholding professional standards and maintaining public confidence

Question 4: Should disclosures to any other people or organisations be excluded?

It is important to us that NDAs are not used to prevent disclosures to us or other regulators. It is one of our mandatory outcomes that you do not prevent reporting to the SRA or the Legal Ombudsman (Outcome 10.7) [https://contact.sra.org.uk/solicitors/handbook/code/part4/content] .

We have made it clear in our warning notice that solicitors must not use NDAs which make people feel unable to notify us, other regulators or law enforcement agencies, of conduct which might otherwise be reportable. Our warning notice states:

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

We do not have a view on whether there should be express provisions set out in legislation to prevent disclosure to other named organisations.

Question 5: Are there any other limitations you think should be placed on confidentiality clauses, in employment contracts or settlement agreements?

We have engaged with various stakeholders about this and a number of them have said that it might be useful for every settlement agreement to carry a clear statement in a prominent position setting out what it cannot exclude as a matter of law. This might help make the scope of these agreements clearer to people.

It has also been suggested that providing a 'cooling off' period might be helpful, similar to the law relating to consumer credit agreements. Negotiating and finalising the terms of these settlement agreements may be emotional and distressing – it might therefore be helpful for the employee to have time to reflect once they are agreed.

Question 6: Do you agree that all confidentiality clauses in settlement agreements, and all written statements of employment particulars, should be required to clearly highlight the disclosures that confidentiality clauses do not prohibit?

A number of stakeholders that we have spoken to have told us that it would be useful to set out the disclosures that confidentiality clauses cannot prohibit. And that these should be in clear and plain language which is in a prominent position rather than hidden away at the back of a long agreement.

Some complainants in the cases that we are investigating were anxious about speaking to us because they thought they would be breaching the terms of their agreement, even in cases where they were not. In our warning notice and our publication Balancing Duties in Litigation [https://contact.sra.org.uk/archive/risk/risk-resources/balancing-duties-litigation/] we refer to the importance of being clear as to the scope of the NDA given the potential vulnerability of the people involved.

> "NDAs 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."

As well as being clear about the scope of the NDA, we have stressed the importance of solicitors not behaving in a way that creates a false impression that the agreement goes further than it does. Our paper Balancing duties in litigation states:

> "…victims have reported being given the impression by the solicitor that they would be imprisoned if they did not comply with the NDA. People that have experienced some form of harassment might be vulnerable, in part because of the harassment itself. Solicitors need to consider this when communicating with them and when drafting an NDA. It might be in the interests of the client to avoid publicity for allegations, but the duty to the client does not override the solicitor's duties to uphold the proper administration of justice, act independently, and to behave in a way that maintains public trust in the provision of legal services."

And in relation to the importance of not taking unfair advantage, the paper goes on to state:

> "Regulatory breaches can arise from any oppressive or domineering tactics, regardless of whether misleading information is included. These tactics include:
>
> - overbearing threats of claims or poor outcomes

- legalistic letters to minors or others who might be vulnerable
- threats of litigation where no legal claim arises
- claims of highly exaggerated adverse consequences."

Question 7: As part of this requirement, should the Government set a form of words?

We can see the benefit of having standard wording but also understand the challenges around this.

Some of the stakeholders that we have spoken to have indicated that standard clauses would be useful as they would introduce a standard approach for all agreements whether they were drafted by lawyers or other advisers.

We understand the reservations expressed by others that standard clauses may be overly restrictive and that a one size fits all approach is not necessarily workable.

Such clauses may be better provided in good practice guidance and/or the proposed Statutory Code from bodies with a wider remit, such as the Equalities and Human Rights Commission or the Advisory, Conciliation and Arbitration Service.

Question 8: Do you agree that the independent advice a worker receives on a settlement agreement should be specifically required to cover any confidentiality provisions?

Appropriate steps to change practice, whether through legislation or good practice guidance, so that NDAs are clearer would be the first step to aid understanding among people being asked to sign such agreements.

Although it could be argued that the terms of section 203(3) of the Employment Rights Act 1996 technically cover this, we see that it could be helpful if there was an express requirement to address this issue. However, there are likely to be challenges in relation to funding this advice, and questions may be raised about the perceived independence of solicitors who are recommended by the employer's representative.

Question 9: Do you think a confidentiality clause within a settlement agreement that does not meet any new wording requirements should be made void in its entirety? What would be the positive and negative consequences of this?

This is a matter for those with expertise in employment law.

Question 10: Do you agree with our proposed enforcement mechanism for confidentiality clauses within employment

contracts? What would be the positive and negative consequences of this?

This is a matter for those with expertise in employment law.