



# Ethics and NDAs

A CELs Think Tank Report

The Centre for Ethics and Law is part of the UCL Faculty of Law and provides a focus for thought leadership, events, research and teaching in the field of law and ethics. It aims to encourage ethical reflection, awareness and positive change through teaching, research and stakeholder engagement with the public, policy makers, regulators, practitioners and academics.

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## Introduction and acknowledgments

This document reports on a Centre for Ethics and Law (CELS) think tank on non-disclosure agreements (NDAs). Think tanks are designed to engage practitioners, policymakers, and academics in discussion of ethical problems. An invited audience and expert panel discuss those problems, suggest how they might be dealt with, and make suggestions as to future directions.

We hold think tanks under the Chatham House rule to encourage frank and constructive conversations – for that reason participants in the conversation are not identified with particular contributions here.

We are grateful to all those who came and participated. We are particularly grateful to Iain Miller (Kingsley Napley) for chairing the event and to Kingsley Napley itself for sponsoring the event and some of the work that went into preparing our report. So too, we are grateful for panel contributions from Sarah de Gay (Slaughter and May) and Clare Murray (CM Murray). Iain, Sarah and Clare put substantial work into preparing their thoughts, some of which are reflected in the work below. We are very grateful too to Xinyi Koay, a final year UCL Laws student, for assisting in the preparation of this document.

Non-disclosure agreements are a tool regularly used by lawyers in many contexts. They have become controversial because of particular cases, especially in employment situations. They raise important issues of principle and public interest. They also raise acute interests for practitioners at the sharp end seeking to run their businesses, protect their clients, and behave with professional responsibility.

We hope this document will contribute to a debate about whether, when, and how such agreements should be used.

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## Context

About twenty years ago, acting for Miramax, Allen & Overy negotiated an NDA inhibiting Zelda Perkins, a former colleague of Harvey Weinstein, from disclosing allegations of serious sexual assault. The exposure of those allegations, and others like them, rapidly snowballed, many years later in 2017, into the #MeToo movement. It has prompted much discussion about sexual harassment in the workplace and lawyers' responses to managing those disclosures.

That NDA has been criticised, in particular, because:<sup>1</sup>

- It sought to inhibit disclosure in, “any criminal legal process” by requiring “where reasonably practicable” at least forty eight hours written notice to be given through a named lawyer at Allen & Overy before making any such disclosure.
- It required Perkins to, “use all reasonable endeavours to limit the scope of [such] disclosure as far as possible”.
- It permitted disclosure to medical personnel of the allegations of misconduct only if the medical professional(s) signed confidentiality agreements agreed with Miramax.
- It is alleged those negotiations took place between a group of Weinstein/Miramax lawyers and one two-year PQE lawyer representing Ms Perkins over a period of about one week, with

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<sup>1</sup> The description of these allegations is taken from the evidence presented by Zelda Perkins to the Sexual Harassment in the Workplace Inquiry before the Commons Select Committee on Women and Equalities, 28<sup>th</sup> March 2018 including excerpts of the NDA, <https://www.parliament.uk/documents/commons-committees/women-and-equalities/Correspondence/Zelda-Perkins-SHW0058.pdf>.

long negotiation sessions over three days, including one twelve hour session concluding at 5am. That negotiation included a meeting where Perkins and Weinstein were present in the same room for a discussion prior to the signing of the agreement.

The potential for such agreements to amount to the perverting of the course of justice has been raised.<sup>2</sup>

The 2018 Presidents Club Dinner allegations are of recent vintage. It concerned young women attending to work a black-tie fundraising dinner as hostesses:<sup>3</sup>

*Upon arrival at the Dorchester, the first task given to the hostesses was to sign a five-page non-disclosure agreement about the event. Hostesses were not given a chance to read its contents, or take a copy with them after signing.*

It is not known at this stage who drafted the agreement or who, if anyone, advised on the manner of its execution. Nor do we have details of the content of the agreement.

The Commons Women and Equalities Committee has since set up an inquiry into sexual harassment in the workplace. This appears to be contemplating the possibility of banning or controlling the use of NDAs in certain situations.<sup>4</sup> In March 2018,

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<sup>2</sup> See, Richard Moorhead, ‘AO, AO, AO: Weinstein’s Men and the Long Arm of the Law’ <https://lawyerwatch.wordpress.com/2017/10/24/ao-ao-ao-weinsteins-men-and-the-long-arm-of-the-law/>. And evidence given before the Select Committee on 28th March 2018, viewable here <https://www.parliamentlive.tv/Event/Index/7f47a9dc-7f5c-4e98-9deb-1713036a4332>

<sup>3</sup>Madison Marriage, ‘Men Only: Inside the Charity Fundraiser Where Hostesses Are Put on Show’ (Financial Times, 23 January 2018) <https://www.ft.com/content/075d679e-0033-11e8-9650-9c0ad2d7c5b5>.

<sup>4</sup> Sexual Harassment in the workplace inquiry <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities->

the Solicitors Regulation Authority also published a Warning Notice on the use of NDAs prompted by these cases but also tackling the use of non-disclosure agreements which might inhibit the reporting of professional misconduct where the alleged perpetrator is regulated by the SRA.<sup>5</sup>

The CELs Think Tank provided an early opportunity to explore issues exposed by these cases and the SRA's document. We brought together leading practitioners from employment and elsewhere: COLPs, regulators, and relevant NGOs. The SRA Warning Notice, in particular, had prompted some early soul-searching around drafting and implementing NDAs. The following summarises the issues raised and seeks to capture the range of viewpoints expressed.

### Is this just an NDA issue?

We started our conversation by asking how far the concerns raised above relate solely to the subject matter of an NDA? And whether concerns about NDAs are limited to employment law issues or extend to other areas of law where confidentiality is used to restrict access to information?

It is possible to frame the issue broadly. Recent years have seen a number of examples of lawyers not thinking clearly enough about their professional obligations. Examples can be found in large and small firms, as well as in-house (commercial, third sector or government practice). Whether such examples indicate greater commercial pressure, a falling off of standards, or greater public scrutiny, it could be said that the

profession needs to pay particular attention now to its professional obligations.

The SRA Warning Notice and responses to it seemed to suggest the profession has had a rude awakening, not having thought about these issues as clearly as they might have. Both Perkins and the Presidents Club Dinner stories potentially engaged the professional obligation not to take unfair advantage of third parties. This obligation has been in the solicitors' professional rules since at least 1974 (Chapter 6, rule 1.1 of a guide to the professional conduct for solicitors talks about not taking unfair advantage of other another party, especially where they are not independently represented, which is replicated in existing outcome 11.1). It was suggested that lawyers have traditionally tended to assume that unrepresented parties cannot be taken unfair advantage of but that less prudent advisers may think absolute advantage can be taken if the person is legally represented. The SRA's Warning Notice, and perhaps the changing climate generally, suggests this may no longer be the case. A prohibition on taking unfair advantage of third parties includes not taking unfair advantage of represented third parties. The debate as to what is fair as opposed to unfair advantage is one which could usefully now develop. The reference in Outcome 11.1 to "unfair" advantage suggests it is not unethical to take "fair" advantage. This begs the question as to when advantage is fair and when it is not, especially as it is now clear that representation is not the (sole) deciding factor.

With some NDAs there may be issues around drafting an agreement whose terms are contrary to the legal ethical principles of upholding rule of law and the administration of justice in the wider public interest. Where the

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[committee/inquiries/parliament-2017/sexual-harassment-workplace-17-19/](https://www.parliament.uk/committees/inquiries/parliament-2017/sexual-harassment-workplace-17-19/)

<sup>5</sup> SRA, Warning Notice, Use of Non-disclosure Agreements (NDAs), March 2018

[http://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Use-of-non-disclosure-agreements-\(NDAs\)--Warning-notice.page](http://www.sra.org.uk/solicitors/code-of-conduct/guidance/warning-notices/Use-of-non-disclosure-agreements-(NDAs)--Warning-notice.page)

confidential information an NDA seeks to govern is solely or mainly information about an iniquity, or in which there is a genuine public interest in disclosure, then the agreement may well be void. Or where the agreement seeks to prevent or inhibit disclosures to the proper authorities, it may similarly be contrary to the public interest in the rule of law and the administration of justice.

## **Is this just an employment law issue? Should NDAs be banned?**

Whilst it would be possible to look at these issues more broadly, we concentrated our discussions on NDAs. They are employed in a variety of contexts, such as: harassment and abuse of children in care cases; employment cases; and a myriad of corporate transactions, where parties sign NDAs as a precursor to mergers or a deepening of business relations. Many cases relate to employees because they often have confidential information with varying mixtures of personal and/or public interest in disclosing such information.

Many participants emphasised the role of NDAs more broadly, in a range of contexts, including commercial ones and cases of serious wrongdoing such as abuse. NDAs were seen as performing a very important function; enabling the alleged victims of wrongdoing to negotiate compensation using their silence as part of their leverage for a deal (or more favourable deal) that they would not otherwise get. Although there were examples where it was felt NDAs might sensibly be banned (pre-employment NDAs, covering future sexual harassment for example<sup>6</sup>

participants thought NDAs could be valuable for “victims” as well as “perpetrators” in many cases: sometimes providing valid protection of valid confidences and reputations and an important bargaining chip for exposed and otherwise less powerful complainants who may want a quick resolution and to ‘move on’.

Similarly, it was argued that NDAs have an important commercial role to play as they protect legitimate interests. In settlement agreements, they have a legitimate place as well: they give claimants the opportunity of entering into settlements without going to court and having to prove their case, avoiding cost and a process which may be lengthy/emotionally challenging.

Being unable to inhibit disclosures to the police, regulators, or – in particular – other potential litigants (such as fellow employees who might be thinking about a harassment claim) might diminish or extinguish civil legal protection for those wanting to make claims against, say, their employers. What is the problem with trading a confidentiality obligation, within reason, to get the most favourable settlement, was the question posed by some. Even in the employment context, NDAs are not just about silencing someone. We were told that, often, a complainant wants to move on as well the organisation, and they are sometimes very happy to enter into these agreements. A complainant rarely wants to litigate; a confidential commercial resolution is usually their preferred outcome.

Conversely, it was also pointed out that NDAs were common in employment situations because whistleblowing often prompted a desire to silence and remove a

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<sup>6</sup>Turning the Tables: Ending Sexual Harassment at Work | Equality and Human Rights Commission’  
<https://www.equalityhumanrights.com/en/publication->

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[download/turning-tables-ending-sexual-harassment-work.](https://www.equalityhumanrights.com/en/publication-)

problem from an organisation rather than face up to it. In this way, NDAs can be seen as a means of stifling proper governance and scrutiny of those organisations. If this view is right, abolishing or restricting NDAs might diminish the inclination of the employers to fire employees with serious concerns and increase their inclination to treat those concerns more seriously. Similarly, treating confidentiality solely as a matter of bargaining between two parties ignores the interest of other parties who might be affected (e.g. other victims of the same perpetrator) and the public interest (e.g. in seeing wrongdoing in crime properly scrutinised). One conclusion which might be drawn is that which of these two views should be preferred depends heavily on the context, and the facts of the individual cases. This includes the importance of balancing the public interest with the need to be led as far as reasonably possible by the interests and wishes of a complainant who has been subjected to sexual harassment. This emphasises the importance of ensuring that NDAs are fairly drafted and implemented.

Some participants felt commercial/corporate NDAs cases were different, and of less concern than NDAs in employment cases. Entering into commercial arrangements used NDAs were part of the standard process of trust building. That did not mean, though, that such agreements did not give rise to problems. We were asked to imagine NDAs between Cambridge Analytica and the research company allegedly harvesting Facebook data. And to contemplate the possibility that there might be NDAs between the two companies which inhibited disclosure of nefarious activity by one or other. If we are worried about the potential for

NDAs to pervert the course of justice in employment discrimination cases, it is not immediately apparent why we should not be similarly worried about those possibilities in commercial cases. Bargaining power was, of course, important and might be expected to be more even in corporate cases. Employees have been identified as a potentially vulnerable group but there are also other relationships, for example between consumers and sellers, tenants and their landlord, and pensioners and care homes. This suggested that whilst NDAs should not be subject to a blanket ban they raised two types of issues:

- Whether certain types of clause were wrong in principle (which might be true for all NDAs); and,
- Whether some approaches to NDAs might be open to question where power dynamics were unbalanced or unfair bargaining processes were used.

## What types of clause might be wrong in principle?

A number of different terms contained within some NDAs were flagged for discussion including:

- a. Restrictions on reporting to the police, regulators and other authorities including giving the other party notice before doing so.
- b. Limits on the ability of the individual party to seek professional advice or counselling after entering into the agreement because the confidentiality agreement is too stringent.
- c. Restrictions on sharing information or providing evidence to those in a similar position. Such as those who have a similar discrimination claim.
- d. Restrictions on making any derogatory comments about the company or staff.
- e. Clawback / forfeiture clauses under which, in the event of breach of confidentiality, derogatory statements or non-assistance, settlement monies may be forfeited and, if already paid, required to be repaid, potentially with costs of recovery.
- f. Restrictions on keeping a copy.
- g. Use of unclear and legalistic language, which is not easily understandable to a lay person or a non-specialist.
- h. Terms that are legally potentially unenforceable – eg: blanket confidentiality provisions and clawback provisions, as well as restrictions in reporting potentially criminal behaviour to the police or making any “protected disclosures” under whistleblowing legislation.

One way of asking the question about which clauses might be wrong in principle was to ask, are NDAs being used to deny people rights that are inalienable, or that should not be subject to private bargaining? For example, can private individuals bargain over confidentiality in serious allegations? Or, to think of it from another angle, were there clauses that could not be used to obstruct, deliberately or accidentally, investigation by the police or regulators?

A second way was to ask if NDAs were impacting on the rights of broader constituencies than the immediate complainant; e.g. when an organisation undermines environmental protection or causes harm to members of public as a class. The law might render void such clauses where they were deemed to be contrary to public policy, for example. It is not unusual to see clauses which may be open to challenge as to their enforceability (e.g. on the grounds of being a potentially unenforceable penalty clause) included in contracts because of their deterrent effect on the complainant. The latter example violates the complainant’s rights if those rights cannot be alienated.

Another way of putting the problem would be to suggest it might be fraudulent for lawyers to seek agreements and then draft clauses that deny inalienable rights (such as a right to disclose information to the police). Such agreements are intended to deceive the parties that rights or obligations exist which do not. Or, similarly, that a lawyer who puts a clause into an agreement knowing that clause to be unenforceable is seeking to mislead the parties as to the law and they are seeking to take unfair advantage of that party especially, but not solely, where they are

unrepresented. This seems to be potentially in breach of the SRA Code of Conduct. Specifically because it breaches the obligation not to take unfair advantage of third parties Outcome 11.1 or more generally because the principle of integrity demands that a solicitor does not mislead anyone.<sup>7</sup>

*"[A] solicitor conducting negotiations or a barrister making submissions to a judge or arbitrator will take particular care not to mislead. Such a professional person is expected to be even more scrupulous about accuracy than a member of the general public in daily discourse."*

## Clauses that are void

A more difficult situation to judge is where a clause is included in an agreement in the knowledge that it may or may not be enforceable. Objecting to NDAs, or clauses in NDAs, simply on the basis that they were contrary to public policy took the discussion into uncertainty in the law being a problem here. Indeed, one of the difficult issues is that because there is no confidence in an iniquity,<sup>8</sup> and because confidential information can be disclosed in the public interest,<sup>9</sup> NDAs that attempt to stifle disclosure of such iniquity or of information disclosable in the public interest should, in principle, fail. In practice, however, it will not necessarily be clear in advance of the agreement being signed whether a court would regard the particular disclosures in question as in the public interest or exposing iniquity. How should lawyers address this issue ethically? We will come later to address some of the

specifics but it is fair to say that some felt the law of confidentiality to be lacking in clarity. And whilst NDAs sometimes sought to protect the subject of the NDAs right to disclose information in the "public interest", because the cases do not fully define what in the public interest means, they struggled to do so with clarity.

## Clauses inhibiting disclosures to the police and regulator

There was general agreement with the idea that clauses that inhibited disclosure to the police were almost certainly unethical. Such clauses were likely void, and otherwise contrary to professional obligations (to protect the rule of law and the administration of justice, for example).

There was a significant risk that such clauses might lead to perverting the course of justice. Whilst some thought the risk of perverting the course of justice might not apply to proceedings or investigations that had not been begun, the Court of Appeal has indicated that, "conduct which relates to judicial proceedings, civil or criminal, whether or not they have yet been instituted but which are within the contemplation of the wrong-doer whose conduct was designed to affect the outcome of them" is capable of being conduct which amounts to perverting the course of justice.<sup>10</sup>

Notably, also, the group of people to whom disclosures should not be inhibited, such as the Solicitors Regulation Authority, the police, the Institute of Chartered Accountants in England and Wales, Public Concern at Work, ACAS or the Equality and Human Rights Commission was broader than the list of prescribed

<sup>7</sup> *Wingate & Anor v The Solicitors Regulation Authority* [2018] EWCA Civ 366 (07 March 2018) [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2018/366.html&query=\(wingate\)+AND+\(evans\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2018/366.html&query=(wingate)+AND+(evans)).

<sup>8</sup> *Gartside v Outram* [1857] 26 LJ Ch (NS) 113

<sup>9</sup> *Lion Laboratories Limited v Evans* [1984] 2 All ER 417

<sup>10</sup> *R v Selva and Morgan (C.A.)* [1982] QB 372, [1982] 1 All ER 96, (1981) 73 Cr App R 333

persons under the Employment Rights Act 1996 (as amended by the Public Interest Disclosure Act 1998).

## Clauses that interfere with the complainant's private life

There was another set of restrictions which met with fairly uniform approbation: those that interfered with, or were perceived as interfering with, a complainant's ability to discuss sometimes traumatic allegations with close family members and professional advisers (such as doctors and counsellors). Such restrictions may or may not be void, but they were seen as being inappropriate. Zelda Perkins evidence to the Commons Women and Equalities Committee is illustrative:<sup>11</sup>

**Q52 Jess Phillips:** *You described the non-disclosure agreement that you reached with your former employer as "stringent and thoroughly egregious", which I had to practise saying earlier. Which aspects of the agreement have given you the greatest concern?*

**Zelda Perkins:** *It is a morally lacking agreement on every level. There are clauses in there that preclude me and my colleague from not only speaking to our friends, colleagues and family about our time at Miramax and what happened, but speaking to any medical practitioner, any legal representative, the Inland Revenue, an accountant or a financial adviser. We can speak to those people, as long as they sign their own non-disclosure agreement before they can enter into any conversation with us about anything. However, even within that, once they had signed that, we were still under pressure to not name anybody with whom any of the events happened.*

**Q53 Jess Phillips:** *Had your colleague who had been sexually*

*assaulted needed trauma counselling, she would have had to get a trauma counsellor to sign a non-disclosure agreement first.*

**Zelda Perkins:** *Yes. She sought counselling, but she never, ever discussed the events, because she was so afraid of this agreement that she felt that she was not allowed to.*

## Disclosures to other (potential) litigants

There was less agreement over how to deal with disclosures by the complainant to other potential complainants. Whilst it was recognised that it was problematic to inhibit their disclosure to the legal representatives of such other complainants where a court so ordered, this did not address the other ways in which such disclosures might be made. As with disclosures to the police, the risk of perverting the course of justice had to be considered even though to do so runs contrary to the feeling amongst some practitioners that it might be proper to inhibit disclosures to other complainants' legal representatives, as long as one did not prevent such cooperation completely through legal process (cooperation conditional on a court order for example). This is an area which merits further analysis and discussion.

## Disclosures in the public interest

Considerable thought might need to be given to whether the nature of the allegation was such that, as a matter of public policy, the person making the allegation would be entitled to disclose it on the basis that there is no confidentiality in an iniquity or that disclosures were in the public interest.

A way of dealing with this might be that NDAs which engage public policy concerns need to put in place extra

<sup>11</sup> Women and Equalities Committee Oral evidence: Sexual Harassment in the Workplace, HC 725, Wednesday 28 March 2018.

protections, such as requiring proper provisions seeking to make clear that rights to disclose iniquity or to make protected disclosure are not affected (see below). And/or requiring that all parties take advice from an independent lawyer in an attempt to ensure the limits of an NDA are understood.

## **Unfair bargaining and complainant understanding**

Both the Harvey Weinstein and Presidents Club examples, as reported, suggested taking unfair advantage of the subjects of NDAs could be a significant problem. Contributors said the ways in which unfair advantage might be taken, or unfair pressure put, on the subjects of non-disclosure agreements could be quite wide. Liquidated damage clauses, especially when coupled with other aggressive terms, were singled out as particularly oppressive to lay participants. An agreement that said (to paraphrase) a breach of the agreement means you have to pay back tens of thousands of pounds together with the employer's related legal fees, for instance, was felt by some to be likely to be oppressive. Others felt it might mean that a "victim" takes an overly cautious approach, e.g. not seeking counselling (if that is not expressly permitted by the NDA). One way of alleviating this might be for NDAs to be clear that consent to/clarification on disclosures can be sought from a named individual/role within the employer organisation independent of the alleged perpetrator.

However, it was also strongly emphasised that lawyers did not generally appreciate how ordinary complainants (whistleblowers, those who claim sexual harassment, and so on) understood or reacted to NDAs.

How a lawyer understood the agreement and how a lay party understood that agreement might be very different. As an example, some lawyers saw having a clause that permitted a lay participant to approach their former employer's lawyer for permission to make a disclosure as perfectly reasonable and a sign of cooperation. Victims might see that as obstructive or terrifying. Similarly, clauses which referred obliquely to not inhibiting protected disclosures, for instance, were not clearly intelligible to complainants.

Whether through ensuring independent advice for complainants, clearer drafting, or guidance and support materials, there was a recognition that a lot more needed to be done to help lay people understand the NDAs they are signing. There was some agreement amongst participants that these kinds of problem needed to be addressed by NDAs containing positive and clear statements about what kinds of disclosure are permitted under the NDA. It was strongly suggested that the lawyer's struggle to understand the ways in which lay parties misunderstood agreements. This exacerbated or exaggerated the potential harm of disclosure agreements. Such agreements might well be in compliance with the law (s. 43J of the Employment Rights Act 1996, which deals with protected disclosures) yet lay parties can feel inhibited and can feel threatened by the prospect of making disclosures which they would like to make and, under the agreement, they can in fact make because the agreements are too complicated or opaquely phrased to be understood.

## Behavioural issues surrounding the signing of NDAs

A number of behavioural issues were flagged for discussion that arise in relation to the circumstances of the signing of the agreement:

- a. Do/should such agreements always require independent legal advice? And, if someone is represented, is it okay to leave them to take any points on whether the restrictions proposed are too onerous and/or practically unenforceable?
- b. Should there be a cooling off period between signing the agreement and it becoming legally binding on the individual?
- c. Can there (justifiably) ever be any restrictions on retaining a full copy of the agreement?
- d. What about negotiating tactics more generally?

Whilst there was generally a preference for independent legal advice to be mandated, this was not always seen as sufficient to protect the rights of complainants. And it did not remove the possibility that an NDA's terms might be improper. There was generally agreement that a cooling off period could be useful, and that it was hard to envisage a situation where refusing retention of the copy of an agreement could ever be justified.

In relation to negotiation tactics more generally, it was agreed that one must not improperly threaten litigation or use improper influence to stop disclosures of wrongdoing. Negotiations structured to cause injustice to parties needed to be avoided. Late night, and long negotiations, which were not required by the exigencies of the situation

needed to be avoided. Reports of the Zelda Perkins case suggested that "bullying" behaviour was possible even where somebody was represented. And the Presidents Club case suggests "bullying" behaviour around requiring signature without having time to read the agreement or in reality, the opportunity to change one's mind about proceeding.

Suggesting that such agreements might not be enforceable was not an answer in and of itself. Structuring a negotiation in an oppressive way was still an attempt to take unfair advantage of a third party. Similarly, in both cases, parties to the agreement appear to have been refused copies of those agreements. Again, it was agreed this was likely to be unprofessional behaviour: taking unfair advantage of third parties, in particular.

An issue to be further explored is the scenario where the drafter of an NDA may not understand how the agreement will be used. It is possible in the Presidents Club case, for example, that someone drafted an agreement in the abstract, perhaps as a template, without asking or foreseeing how it would be used further. Further, NDAs can be drafted online and without engaging a regulated lawyer. A related question which we did not have time to consider is the extent to which lawyers need to investigate the background in circumstances in which they are being asked to draft NDAs. An interesting further question is whether and when regulated lawyers should be held to higher standards than unregulated practitioners?

### What practical steps can legal professionals and firms take to minimise risk?

Partners in firms should be thinking about what should be in model NDAs,

how they will be used, and what advice should be given about how they can be used. Conversely, there is a danger of rushing younger lawyers into working with template forms. They should not lose these blank-page drafting skills or the ability to think from first principles. Another anxiety was that some of the work on drafting model form NDAs would be delegated down to PSLs to decide the right wording. They, however, are not those on the frontline proposing agreements and it would be the frontline lawyers that would face the scrutiny of the SRA should things go wrong.

When drafting model NDAs, the perspective of ordinary litigants needs to be considered in the process. How do they understand these agreements? What have their experiences been? What has the impact been? There is a tendency for lawyers to think they understand these litigants' perspectives' but, instead of assuming this, their opinions should be sought. One approach would be for a model form to be developed by an appropriate body and properly tested for understanding on users.

## Conclusions

In broad terms the following clauses were all seen as problematic:

- a. Restrictions on reporting to the police, regulators and other authorities including giving the other party notice before doing so.
- b. Limits on the ability of the individual party to seek professional advice or counselling after entering into the agreement because the confidentiality agreement is too stringent.
- c. Clawback / forfeiture clauses under which in the event of breach of confidentiality, derogatory statements or non-

assistance provisions settlement monies may be forfeited and, if already paid, required to be repaid, potentially with costs of recovery, especially if coupled with other aggressive terms.

- d. Terms that are legally potentially unenforceable – e.g. blanket confidentiality provisions and clawback provisions, as well as restrictions on reporting potentially criminal behaviour to the police or making any “protected disclosures” under whistleblowing legislation.
- e. Restrictions on keeping a copy.

Agreements either needed to avoid such clauses or make clear, positive, and intelligible statements about the rights of the parties to an NDA to make certain kinds of disclosures in spite of such restrictions (so as to avoid the risk of impeding investigations or otherwise inappropriately influencing legal process).

There were similar, if more muted, concerns expressed around restrictions on sharing information or providing evidence to those in a similar position to complainants, such as those who have a similar discrimination claim.

In relation to intelligibility, use of unclear and legalistic language, which are not easily understandable to a lay person or a non-specialist needed to be avoided. This involved thinking about readability and, potentially, researching how the subjects of NDAs responded to the wording of their agreements.

In relation to behavioural issues independent advice for complainants was desirable, and required in relation to certain employment cases, but it was not an excuse for ignoring questions of professional ethicality.

Properly conducted negotiations needed to be structured reasonably.

A cooling off period for NDAs might assist parties otherwise rushed into inappropriate agreements.

It was difficult to see any circumstances in which an agreement could ever be acceptably negotiated which did not allow parties to read that agreement prior to its execution and keep a copy of it.

### **What next?**

The SRA's Warning Notice has underlined the need for professional responsibilities around NDAs to be taken seriously and discussed by lawyers and their firms and their interest groups. They were on notice that they needed to be much more careful with drafting settlement agreements with non-disclosure elements to them.

Thinking about these issues can become complicated. Whilst individual lawyers can never delegate their professional responsibilities, and it is always important for them to be able to think through the professional ethics dimensions to a problem from first principles, there is considerable merit in developing best practice ideas and materials designed to encompass some of the problems we have discussed above. Busy practitioners need to think for themselves but also to have guidance on models that work. Those models needed to cover both the text of NDAs and the behaviours that surrounded their implementation and steps that might be taking that a firm level to ensure that professional obligations in this area were understood.

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