Written submission from Solicitors Regulation Authority  
(SHW0021)

Introduction

1 The SRA is the regulator of solicitors and law firms in England and Wales. We work to protect consumers 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. Further information is available at www.sra.org.uk.

2 We are the largest regulator in legal services in England and Wales, covering around 80% of the regulated market. We oversee around 184,000 solicitors and over 10,400 law firms.

3 We welcome the invitation to feed into the Committee Inquiry.

4 This submission covers the following issues:
   - the use of NDAs and the responsibility on firms to report misconduct to the SRA
   - our response to the sexual harassment complaints we receive
   - wider work of the SRA in response to these issues.

The use of non-disclosure agreements (NDAs)

5 We recognise that NDAs are widely used in workforce management and permitted in employment legislation. They 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.

6 But there may be instances where they are misused, for example when signatories are not well informed or feel pressurised, or if used to address serious matters that should be reported to, for example, the police or a regulatory body. The complex ethical and regulatory issues are attracting legal debate as to whether solicitors (and others) are using these agreements to take unfair advantage of people, and to ‘cover up’ what may be criminal offences.

7 There is an obligation on all solicitors to report professional misconduct to us as part of the Code of Conduct. Our position is that the onus to report potential professional misconduct relating to serious sexual harassment to us is on the firm and not individual solicitors who may have been the victim of sexual misconduct themselves. We do not anticipate taking any action against a solicitor for not reporting allegations of sexual harassment, where they had been the victim.
We are being transparent in our expectations of solicitors by providing guidance on the use of NDAs and clarifying our expectations of solicitors to report incidents of sexual harassment.

On NDAs the SRA has:

- issued a new Warning Notice (Annex A) on the use of NDAs, which raises awareness of the risks and that reminds law firms and solicitors that potential professional misconduct must be reported to the regulator. This includes sexual harassment or misconduct towards other employees or clients
- updated the FAQ section of our Ethics Guidance website pages (Annex B) in relation to reporting sexual harassment and the use of NDAs and provided further information on the Ethics Guidance pages of our website, with two case studies (Annex C) to help solicitors and firms understand their expectations around behaviour and reporting: one involves a sexual harassment complaint, the other alleged sex discrimination and an out-of-court settlement. In both instances, the law firm would be expected to report the misconduct to the SRA
- used SRA Update, which goes to the entire profession, to remind firms of their responsibilities to report behaviours in the workplace that raise misconduct concerns. We also pressed home the point on the use of NDAs
- recognised the risks which arise when using NDA’s and the issues which arising in the course of litigation in our publication Walking the line: the balancing of duties in litigation\(^1\). Published in March 2015, we are reviewing our guidance to make sure we take account of the issues highlighted by the recent sexual harassment claims. This will be informed by a review of the calls received by our Ethics Guidance team and the complaints we have received about NDAs.

Solicitors are often involved in supporting clients who want to use an NDA. The principle that an NDA should not be used to for example, cover up a crime remains. The client should be reporting the potential crime in the first instance. Solicitors should give due regard to client confidentiality and legal professional privilege, and our guidance at [https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Disclosure-of-client-confidential-information.page](https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Disclosure-of-client-confidential-information.page).

We recognise that anyone can be the victim of sexual harassment. We also recognise that harassment because of other characteristics protected by the Equality Act 2010 is equally abhorrent.

Our response to the sexual harassment complaints we receive

Our general approach to assessing complaints of this nature is set out in our decision making guidance\(^2\). This makes it clear that we expect solicitors to meet the high ethical standards we have set, specifically the obligation to:


• uphold the rule of law and the proper administration of justice (Principle 1)
• to act with integrity (Principle 2)
• to behave in a way that maintains the trust the public places in you and the provision of legal services (Principle 6).

13 In each case we assess whether the information brought to our attention suggests a serious breach of our regulatory requirements.

14 These principles extend to conduct outside of practice, as do some of the standards in the underlying Code of Conduct. For example, where a solicitor takes advantage of a third party in their personal capacity or uses their professional title improperly to advance their personal interests. Therefore, we investigate complaints involving professional misconduct both inside and outside the workplace, including those involving sexual harassment or improper conduct.

15 We take complaints in relation to sexual harassment very seriously. We carry out a review of harassment and discrimination complaints every year, as part of our Equality, Diversity and Inclusion monitoring, although the number of complaints of this nature that we receive are low. Our last report indicated that 1.3 percent of complaints received in 2016 raised allegations of discrimination or harassment, similar to previous years. We investigate these complaints thoroughly and take robust action in instances of serious sexual misconduct.

16 Since 1 November 2015, there have been 23 reports made to us of potential sexual misconduct between colleagues. Nine were made in 2015/16, 12 were made in 2016/17 and a further two have been received since the start of the current business year. Of these reports, nine are still open and two have led to sanctions. The rest have not been progressed, mostly because insufficient evidence was provided, or the complainants did not want to take the matter further.

17 Outside of these complaints, six cases involving sexual misconduct have been heard by the Solicitors Disciplinary Tribunal (SDT). Four involved convictions for indecent images of children. A fifth saw the solicitor struck off for suggesting a vulnerable female client could pay off her bill with sexual favours, and the sixth involved sexual assault of a woman at a personal social event, not related to work.

18 We constantly monitor the regulatory environment to identify risks in sector and take regulatory action accordingly. We will continue to monitor complaints of sexual harassment and identify trends in reporting.

Wider work of the SRA in response to these issues

19 In the light of the recent focus on sexual harassment in the workplace, we have taken further measures specifically to expressly raise awareness of these issues:

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2 https://www.sra.org.uk/sra/decision-making/guidance/investigations-decisions-investigate-concerns.page
our Regulatory Management team talks regularly with the firms it manages about diversity and has a rolling programme of meetings with them. We have revised our template for these discussions to make sure that the firms’ approach to preventing and managing sexual harassment are reviewed

- we have linked to the EHRC’s publication Sexual harassment and the law: guidance for employers\(^3\) on our website and are raising awareness in the profession about the guidance
- we are supporting the EHRC with their Inquiry
- we will review the information we have about the prevalence of sexual harassment in the solicitors’ profession, seek further information from organisations such as LawCare and consider whether a thematic review of this issue would be beneficial
- we will use the newly set up Equality and Diversity Group of the Legal Regulators Forum to share experience of regulating sexual harassment and explore what more we can do.

**Conclusion – looking ahead**

20 We can always do more to promote ethical standards and public trust and confidence in both the solicitor profession and its regulation. We have consulted\(^4\) recently on reforms to our Handbook\(^5\). These aim to significantly simplify our regulatory rules and standards to create shorter, clearer principles and codes with a sharp focus on high professional standards.

21 We are introducing a new Enforcement Strategy\(^6\), informed by the views of thousands of members of the public and profession through our Question of Trust campaign\(^7\) in which we sought views on the seriousness of conduct across a wide range of real life scenarios. This clarifies that we will consider any behaviour which harms an individual’s personal autonomy or dignity, or which impacts on their fundamental right to privacy and non-discriminatory treatment, to be at the higher end of the scale of seriousness.

22 Making sure that we are effectively regulating the use by solicitors of NDAs and providing clear guidance about the ethical issues involved in their use will promote the rule of law and promote adherence to professional principles. It is also in the public interest and interest of consumers that NDAs are not misused to inhibit the rights and responsibilities of people who suffer sexual harassment or other improper behaviour. Our work to engage with the profession and promote good practice in this area will help to promote a strong, effective and diverse profession. The profession must respond appropriately to allegations of sexual harassment and promote a culture for solicitors and others working in the law which does not tolerate such behaviour.

**Annex A: SRA Warning Notice on use of non-disclosure agreements (NDAs)**


\(^5\) [https://www.sra.org.uk/handbook/](https://www.sra.org.uk/handbook/)


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 Handbook - 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 us or other regulators or law enforcement agencies of conduct which might otherwise be reportable

- fail to notify us 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 Handbook, 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 2011 set out below:

Principle 1: uphold the rule of law and the proper administration of justice

Principle 2: act with integrity

Principle 3: act independently

Principle 6: behave in a way that maintains the trust the public places in you and in the provision of legal services

Principle 7: comply with your legal and regulatory obligations and deal with your regulators and ombudsmen in an open, timely and co-operative manner

Principle 8: run your business or carry out your role in the business effectively and in accordance with proper governance and sound financial and risk management principles.

The SRA mandatory outcomes

You should have regard to specific outcomes under the SRA Code of Conduct 2011:

Outcome (10.3): you notify the SRA promptly of…serious failure to comply with or achieve the Principles, rules, outcomes and other requirements of the Handbook

Outcome (10.4) you report to the SRA promptly, serious misconduct by any person or firm authorised by the SRA, or any employee, manager or owner of any such firm

Outcome (10.7): you do not attempt to prevent anyone from providing information to the SRA or the Legal Ombudsman

Outcome (11.1): you do not take unfair advantage of third parties in either your professional or personal capacity.

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:
  
  o 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
  
  o making a protected disclosure under the Public Interest Disclosure Act 1998
  
  o reporting an offence to a law enforcement agency
  
  o 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.

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.

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 achieve Outcomes 10.3 or 10.4 and of one or more SRA Principles.

Any attempt to prevent a person from complaining or providing information to us will be a failure to achieve Outcome 10.7. Indicative Behaviour (10.11) cites, 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 Outcome 10.7 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 unsustainable, may well involve serious breaches of the Principles or Code. These are likely to breach our requirements, including Principle 1 and 6 as well as Outcomes (10.7) and (11.1). 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 (see Indicative Behaviour 11.7).

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**

Question of Ethics on settlements and reporting discrimination
Question of Ethics on how to deal with a complaint of sexual harassment?
SRA Risk paper *Walking The Line: The balancing of duties in litigation*

**Further help**

For guidance on conduct issues, contact the Professional Ethics Guidance Team.

**Annex B: Reporting sexual harassment and the use of NDAs FAQs**


1. Q: Why should we have to report potential sexual harassment related misconduct to the SRA?

   A: Solicitors must maintain the professional standards we set in the public interest - and that the public expect. They have an ethical responsibility to report potential misconduct to us. **Outcome (10.4)** makes it clear that you have a duty to report misconduct to us.

2. Q If both parties want to sign a non-disclosure agreement (NDA), why is there any need to report misconduct to the SRA?

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8 *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.
A: The use of an NDA does not affect your duty under Outcome (10.4) to report the matter to us. Where you have reasonable grounds to suspect that there has been a breach of the Principles or Outcomes you must make a report. This duty is not overridden where the complainant does not consent to such report.

3. Q: Should we have to report a potential crime to the police if there is no specific requirement in law that we do?

A: Serious sexual harassment is likely to comprise a criminal offence. Solicitors are officers of the court and have a responsibility to uphold the rule of law and support the administration of justice. In general, if a solicitor has reasonable grounds to think a crime has been committed, they should report it.

4. Q: Do we have to report a potential crime to the police if the person making the complaint does not want to involve the police?

A: You should discuss this with the victim and, if they do not wish the matter to be reported, give careful consideration as to whether or not it may still be in the public interest to do so and how you can support the victim. There may be a clear public interest in reporting – for example any one instance could be part of a wider pattern.

5. Q: If both parties want to sign a non-disclosure agreement (NDA), why is there any need to report a potential crime?

A: NDAs should not be used to cover up crimes. Solicitors are officers of the court and have a responsibility to uphold the rule of law and support the administration of justice. If a solicitor has reasonable grounds to think a crime has been committed, they should report it.

6. Q: Will the SRA always report allegations of a potential crime to the police?

A: We routinely share relevant information with a range of enforcement agencies and other regulators when necessary to do so. We cannot investigate a crime, that is a matter for the police. So we will continue to report potential crimes to the police.

7. Q: Will the SRA report a potential crime to the police if the victim does not want it reported?

A: As is the case for law firms, we will always consider whether there is a public interest in making a report. We will consider each case on its merits and work to support the victim.

8. Q: If a solicitor or law firm identifies a potential crime while supporting a client in drafting an NDA, is the onus on the client or the solicitors to make a report to the police?
A: The client should be reporting the potential crime in the first instance. Solicitors should give due regard to legal professional privilege and our guidance at https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Disclosure-of-client-confidential-information.page

Annex C: Case Studies on Settlements involving allegations of discrimination


Q. We are the subject of a claim from an ex-employee involving allegations of sex discrimination by this firm against her. We have reached an out-of-court settlement with her solicitor which does not include any admission of liability. The agreement has yet to be finalised, but our COLP is concerned that discrimination is something which should be reported to the SRA. However, the agreement reached includes a confidentiality agreement which prevents either party from disclosing details. What is the correct position?

A. Outcome (2.1) of the SRA Code of Conduct 2011 states that you must not discriminate unlawfully, or victimise or harass, anyone in the course of your professional dealings. This goes much further than the law and includes discrimination against any third party, as well as employees of your firm.

The SRA views discrimination as misconduct that comprises a serious breach of your regulatory obligations. Consequently, if as a result of your investigation of the complaint, you are of the view that discrimination occurred, you must report it to the SRA (see Outcomes (10.3) and (10.4)). The obligation to report applies to both the firm and to you personally, and to your COLP (rule 8.5(c) of the SRA Authorisation Rules 2011).

The confidentiality clause in the settlement agreement does not absolve you of your obligation to notify the SRA as required by the Handbook; you should take this into account when drafting or agreeing such a clause. Failure to report, when you are required to do so, is in itself likely to be treated as a serious breach of your regulatory obligations.

As a matter of law, a non-disclosure agreement (NDA) cannot be used to prevent protected disclosures being made, to relevant bodies, by the complainant (Employment Rights Act 1996). If this information does not form part of the NDA itself, then in order to comply with Outcome (11.1) (unfair advantage), it should be made clear to an unrepresented complainant before they sign the document.

Similarly, Outcome (10.7) provides that you do not attempt to prevent anyone from providing information to the SRA or the Legal Ombudsmen. Indicative behaviour (10.11) cites, by way of an example, entering into an agreement which attempts to preclude the SRA from investigating any actual or potential complaint or allegation of professional misconduct. The non-disclosure clause must not, therefore, be drafted in such a way as to prevent such a complaint.
To unduly influence a complainant to enter into a NDA to save the firm’s reputation will risk action for breach of Principle 2 (Integrity).

Q. I am a manager in my firm. A junior fee earner has just come to my office and made a complaint of sexual harassment against one of the senior members of our practice who has on several occasions put his hand up her skirt. What should I do?

A. As a matter of general law you must comply with requirements set out in legislation - including the Equality Act 2010 - as well as the conduct duties contained in the SRA Code of Conduct 2011 (the code). You should ensure all managers are aware of their role in upholding your legal duties as employer. Managers have a duty of care to protect your workers and you will be legally liable for sexual harassment in the workplace if you have not taken reasonable steps to prevent it. Some helpful information about sexual harassment and your legal duties as employers can be found at www.equalityhumanrights.com/en/publication-download/sexual-harassment-and-law-guidance-employers.

Further, sexual harassment of this nature is likely to comprise a criminal offence. Solicitors are officers of the court and have a responsibility to uphold the rule of law and support the administration of justice. If a solicitor has reasonable grounds to think a crime has been committed they should report it. You will therefore need to consider carefully whether to report this conduct to the police. You should discuss this with the victim and, if they do not wish the matter to be reported, give careful consideration as to whether or not it would in any event be in the public interest to do so.

Your duties under the code are to comply with the Principles and Outcomes, in particular Principles 1 (uphold the rule of law), 2 (act with integrity), 6 (maintain public confidence) and 9 (encourage equality of opportunity and respect for diversity). It is worth noting that Principles 1, 2 and 6 apply outside of practice. To comply with Outcome (2.4), you must ensure that you investigate complaints of discrimination promptly, fairly, openly and effectively.

You are required by Outcome (7.2) and Outcome (7.3) to have in place effective systems and controls to achieve and comply with all the Principles, rules and Outcomes, to monitor and manage risks and to take steps to identify and address issues identified.

These systems will usually include a documented complaints procedure covering such aspects as how the investigation is to be carried out, reporting matters to relevant authorities and consideration of suspension or other action whilst investigations continue. You should immediately invoke the firm’s procedure. Bear in mind that Indicative behaviour (10.6) indicates that responding appropriately to any serious issues identified concerning the propriety of your employees, managers and owners will help evidence compliance with your duties.

You have a duty under Outcome (10.4) to report misconduct to us. Where you have reasonable grounds to suspect that there has been a breach of the Principles or Outcomes by the senior member of the practice you must make that report. This duty is not overridden where the complainant does not consent to such report.
Should the parties be considering dealing with the matter by way of a non-disclosure agreement (NDA), please first read our warning notice on the issue. The use of a NDA does not affect your duty to report the matter to us.

As a manager, you will share responsibility for ensuring that staff members are protected from such behaviour. Having in place a training plan and staff handbook that clarifies the behavioural, legal and conduct requirements of staff would help support the firm in safeguarding all members.

March 2018