Introduction

1. I have spent much of my career researching lawyers and legal services. An area of particular interest is the ethics and regulation of lawyers. In the main, my submission concentrates on:

1.1. Ethical and administration of justice issues raised by the Zelda Perkins NDA as discussed in evidence before the Committee on 28 March.

1.2. General points about the approach of lawyers to professional ethics, some of that approach being demonstrated in the 28 March hearing and apparently causing some Committee members concern.

1.3. Ethical issues raised by NDAs more broadly and the SRA’s Warning Notice.

The ethical problems of the Zelda Perkins NDA

2. In this document, by the term ‘ethical problems’, I mean problems which may give rise to breaches of a lawyer’s professional code. Lawyers have a specific role. A lawyer’s ethical requirements are different from what one thinks of as ordinary ethicality. Sometimes professional ethics require lawyers to violate ordinary moral standards (to defend someone they believe to be guilty being the classic example) and sometimes professional ethics require lawyers to adhere to higher moral standards (for instance, around conflicts of interest or care with honesty).

3. There are two main areas of ethical concern raised by Zelda Perkins’ NDA: the manner of its negotiation and the substance of the obligations it purported to create. There is an evidential problem in understanding the agreement and its negotiation. I have mainly relied on the, so far, unchallenged evidence of Zelda Perkins; the NDA disclosed on the Committee’s website; and the ‘hypothetical’ account from Mark Mansell about NDAs of the kind Zelda Perkins discussed. Mr Mansell’s account is hypothetical in the sense that it appears to be evidence about cases like Zelda Perkins case, rather than specifically about the case in question. This leaves several crucial issues unclear.

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1 Professor of Law and Professional Ethics, Vice Dean Research, Faculty of Laws. This evidence is submitted in a personal capacity. It is not meant to represent the view of UCL or the Faculty of Laws.
Limitations on speaking to the police and other legal actors

4. The most controversial clause of the agreement is one limiting Zelda Perkins’ ability to make disclosures to the police and during other forms of legal process, including civil litigation. As I read the clause it:

4.1. Prohibits disclosure to any person or entity unless Zelda Perkins is required by legal process to disclose.

4.2. Requires (for civil cases) and seeks to ensure “where reasonably practicable in the case of any criminal legal process” that at least 48 hours written notice is given to the Company through Mark Mansell at Allen & Overy prior to any such disclosure.

4.3. Requires Zelda Perkins to, “use all reasonable endeavours to limit the scope of the disclosure as far as possible.”

4.4. Requires Zelda Perkins to provide reasonable assistance to the Company and its legal advisers in contesting any such legal process (should they choose to).

4.5. Requires this to be done prior to her being able to take legal advice on potential disclosures.\(^2\)

5. Mark Mansell indicated in his evidence, “it would not be either reasonable or lawful to prevent somebody from participating in a criminal process” through an NDA. He also suggests that a clause could legitimately be used to prevent certain kinds of information being given to the police. The nature of restrictions he thought legitimate were not clearly defined. He referred to disclosures, “over and above what strictly needs to be done,” and the clauses designed to prevent, “information being disclosed that is not necessary for that process, [such that] the individual who is seeking to protect those interests has an opportunity to be involved”.

6. When pressed further that this approach, “flies in the face of telling the truth, the whole truth and nothing but the truth”,\(^3\) he says:

> I do not think that I am saying that you should not tell the truth and the whole truth, but there may be information that somebody could voluntarily disclose that they do not necessarily need to. If they are asked a specific question, either by the police or during a criminal process, they should definitely be able to answer that.

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\(^2\) The disclosed agreement states, “In the event that the Company does not contest such legal process or the challenge is not successful, you may make disclosure to your legal advisors (who must first agree in writing to be execute a confidentiality agreement in a form satisfactory to the Company in the form of paragraph 6)”

\(^3\) Phillip Davies MP
7. As a strategy for dealing with interviews this reminds me of the children’s game Battleships; the police can guess what might be relevant but Perkins cannot volunteer for them the location of what they seek. It points to the first problem with this approach: it suggests that the NDA was designed to shape the evidence that would be presented to the police – or others engaged in lawful legal process - governed by ideas of relevance influenced by A&O’s clients.

8. Furthermore, under the clause, if I understand it correctly, she should decline to be interviewed voluntarily. In such circumstances, I suspect she would ordinarily be unlikely to be compelled to give evidence by either the police or a civil party with (say) their own claim against (say) Weinstein or Miramax. An obvious exception might be if Perkins had signalled to the police or third party that she had something of significant importance to say, thereby risking breaching the NDA, and them seeing it was worth trying to compel her giving evidence. That possibility aside, the impact of the clause is, in practical terms, likely to inhibit disclosure completely, save for exceptional circumstances or a breach of the agreement by Zelda Perkins.

9. Problems with the agreement may be compounded by the apparent reservation of a general, apparently unlimited, requirement not to disclose, “any Confidential Information without the prior written consent of Harvey Weinstein or Bob Weinstein.”

Might the use of this kind of clause amount to perverting the course of justice?

10. In this section I am going to consider whether the agreement might amount to perverting the course of justice. I emphasise that this is a twenty year-old case and that the evidence is neither complete nor fully tested. I am not interested in seeking to tarnish Mr Mansell’s reputation, nor in seeing him prosecuted. I am interested in this issue because I see it as indicative of how lawyers can sometimes come close to, or cross the lines, set for them by the legal system: their professional rules and the broader law. I suspect, but it is speculation, that the idea that drafting strong NDAs might amount to perverting the course of justice has not crossed the mind of many practitioners. And I seek to make the point that the conduct in this case is consistent with a broader culture of professional minimalism,⁴ which I will discuss later, and which I believe needs challenging.

11. The offence of perverting the course of justice is committed where someone: (a) acts or embarks upon a course of conduct, (b) which has a tendency to, and (c) is intended to pervert, (d) the course of public justice.⁵ It is an offence, “concerned with the course of justice and not

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merely the ends of justice.”

6 The conduct must be designed to affect the outcome but proceedings do not have to have begun, nor do investigations have to have commenced for there to be an offence.7

12. The offence plainly covers concealing evidence with intent to influence criminal investigations. It is not necessary to show the course of justice was actually perverted.8 If the clause was intended to inhibit disclosure of allegations of criminal conduct and to prevent (say) Weinstein or the Company being investigated for a criminal offence then there is a basis on which a charge can be brought.

13. What if it was argued that the act was intended in part to shield sensitive or irrelevant information that the police did not need to see?9 Having partly laudable motives is not a defence in and of itself.10 Even if, and it is important to emphasise this has not been suggested in this case, a complainant in a sex harassment case was known to be a liar by their employer this would not necessarily justify the employer inhibiting the complainant’s engagement with the police through an NDA. It has been held that attempts to persuade a dishonest witness to tell the truth can amount to perverting the course of justice: “Even if the intention of the meddler with a witness is to prevent perjury and injustice, he commits the offence if he meddles by unlawful means.”11 Such means could include bribery, fear, or improper pressure. Even, a lawful threat, or exercise of a legal right can constitute an act intended to pervert the course of justice, “if the end in view is improper.”12 So even if elements of an NDAs are seen as an exercise of a lawful right, which is highly debatable in the context of this clause, the manner of their application might nonetheless amount to perverting the course of justice.

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6 In Downes, Re Application for Judicial Review [2006] NIQB 79

7 R v Ratifique [1993] QB 843


9 As far as I am aware there is no suggestion as to what such information would be, and this would be an important part in justifying the clause.


14. The following provides a sense how cases need to be looked at in the round:

“...There may be cases of interference with a witness in which it would be for the jury to decide whether what was done or said to the witness amounted to improper pressure, and so wrongfully interfered with the witness and attempted to pervert the course of justice, and it would be not only unnecessary and unhelpful but wrong for this court or the trial judge to usurp their function. The decision will depend on all the circumstances of the case, including not merely the method of interfering, but the time when it was done, the relationship between the person interfering and the witness and the nature of the proceedings in which the evidence is being given. Pressure which may be permissible at one stage may be improper at another. What may be proper for a friend or relation or a legal adviser may be oppressive and improper coming from a person in a position of influence or authority. But it is for the judge to direct the jury that some means of inducement are improper and, if proved, make the defendant guilty .... A jury should be directed that a threat (or promise) made to a witness is, like an assault on a witness, an attempt to pervert the course of justice, if made with the intention of persuading him to alter or withhold his evidence, whether or not what he threatens (or promises) is a lawful act, such as the exercise of a legal right, and whether or not he has any other intention or intends to do the act if the evidence is not altered or withheld."\(^{13}\)

15. So, for instance, it would be open to the jury to conclude that the manner of the negotiation, and the fact that it was conducted through reputable solicitors, with both parties represented, meant the pressure applied to Zelda Perkins not to disclose information was proper and the intention of the clause was not to pervert the course of justice. Conversely, they might find the unusual and extensive nature of the negotiation, and the unusual terms as evidence that the NDA had an intended tendency to pervert the course of justice.

16. To show a tendency to pervert the course of justice, “there must be a possibility that what the accused has done “without more” might lead to injustice.\(^{14}\) And to show intent it is not necessary to show the wrongdoer believed they were acting through unlawful means but that they had, “knowledge of all the material circumstances and the intentional doing of an act having a tendency, when objectively considered, to pervert the course of justice.”\(^{15}\) As we have seen, if the

\(^{13}\) Ibid. pp. 392–393, 252–253

act tends to and is intended to pervert the course of justice, then motive is generally irrelevant. The test would be, then, whether it was intended that the agreement inhibit Zelda Perkin’s willingness to make disclosures to the police and thereby change (or affect) the course of justice.

17. It should be re-emphasised that we only have a limited understanding of why the agreement is drafted as it is and of how the negotiation was conducted as it was. In particular, Mr Mansell has only responded hypothetically to questions about ‘this kind of agreement’ and was not able to respond specifically to this agreement. There may be further confidential information which he has not been able to divulge to the committee which would shed further light on the agreement, and what the intentions behind it were.

18. That said, the NDA allows someone who might be investigated by the police to exert unilateral influence on whether an investigation was likely and what was to be considered relevant for the purposes of that criminal investigation. And it is plainly arguable that the agreement’s had the effect of improperly pressuring Perkins from instigating or cooperating in a criminal investigation if one could have been begun (if a criminal offence had been committed in England and Wales, for example). As a result, there is a significant risk that the NDA exposed both Mr Mansell and/or his clients to a charge of perverting the course of justice. However the point I want to make in examining these actions at such length is that it shows how experienced and well-qualified lawyers can sometimes skate close to or across lines of profound importance to the administration of the justice system.

19. Let me turn to how the evidence before the committee chimes with evidence about lawyers’ ethics more generally.

**Lawyers ethics more generally**

20. I have explored elsewhere the idea of Professional Minimalism. Based in part on interviews with commercial practitioners, that work suggests that: (1) practitioners often adopt a view that ethical issues are infrequent and not much relevant to what they see themselves as doing; (2) they have a tendency to equate unethical conduct with criminal illegality, sometimes only with clear or deliberate criminal illegality (this is one reason for the detailed previous section); (3) they

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16 Moorhead and Hinchly, n4.
seem to have relatively little awareness of professional principles or professional conduct rules except for the principle protecting the interests of the client; (4) that ambiguity diminishes rather than heightens ethical relevance (in legally uncertain areas the client’s view trumps); and, (5) they engage in ethical displacement: seeing ethical problems as matters of ordinarily morality and so primarily a matter for their employers or clients not for them.

21. This is a generalisation. Not all practitioners adopt this viewpoint, and certain situations (such as disclosure of documents, as Mr Brahams mentioned in evidence before you) are more widely recognised as engaging ethical principles. However it is worth reflecting on a point captured most acutely by Phillip Davies MP’s question to witnesses at the end of the 28 March session:

...what does it say about the legal profession that you are all very clear on the Solicitors Regulation Authority’s principle about acting in the best interests of each client, but you all seem so vague and have no idea what on earth is meant by upholding the rule of law and the proper administration of justice, acting with integrity, and behaving in a way that maintains the trust the public place in you and in the provision of legal services? Is it a reflection of the legal profession that one of those is very clear to you, and you seem to have no idea what any one of the other three means? 21

22. Let us take Mr Mansell’s evidence that a clause preventing a complainant discussing matters with the police is prohibited but shaping that disclosure might not be and is therefore permissible. Putting to one side my reading above that the agreement does, or comes very close to, preventing disclosure; how to interpret that evidence? He might be unaware that shaping disclosures to the police can constitute perverting the course of justice. Or he might take the view that the potential risks do not apply or are not sufficiently clearly spelled out in the law for him or his client to be inhibited by them. So, for example, because there is not a case of a solicitor drafting a similar NDA and being successfully prosecuted for it – he might feel the law is sufficiently uncertain that he can disregard potential restrictions in favour of his client. Or he might take the view that because one can articulate the view that a clause is potentially justifiable, because the law does not prohibit parties exerting any influence on potential witnesses, it is in fact justified in the instant case.

23. Secondly it seems that he sometimes sees his professional obligations as discharged by advising his clients on questionable tactics. Or that his approach is tested through negotiating with an opponent. As a result of these two processes he might see his ethical responsibilities as having

17 Philip Davies MP
been met: either the client told him to do it, or his opponent failed in his duty to protect their own client and stop him.

24. We get a sense of the former when tactics of particular concern are put to him by Committee members. One example was him allegedly allowing Weinstein to talk directly to Perkins prior to the signing of the agreement. Here Mr Mansell appeared to defend himself, hypothetically, on the basis that he would advise his clients against certain steps, like having the alleged perpetrator in the room during a negotiation. What he did not say is what he would do if the client insisted. A possibility that cannot be discounted is they might insist and he would accede.

25. The approaches I am describing are consistent with the idea of professional minimalism I set out above. The lawyer does not see himself as inhibited because he is not doing something which is plainly, unarguably illegal. And the client gets all the benefit of uncertainty, such as whether the agreement risks perverting the course of justice, and also gets to take decisions about and therefore responsibility for unsavoury tactics.

26. Moreover, those decisions are often shielded by client confidentiality and legal professional privilege. The client can say, “I was acting on advice,” and the lawyer can say, “I was only following instructions.” There are important interests protected by legal professional privilege but abuse of it can lead to a lack of accountability and sometimes mutual irresponsibility.

27. There was, I think, a similar indication of a minimalistic approach when Gareth Brahams sought to engage with the Chair of the Committee’s question about whether respondent employment lawyers deployed a ‘macho’ approach:

Gareth Brahams: Can I say, in response to that, that it is a nuanced thing? Our issue that we have as solicitors is that our obligation is to act in the best interests of clients.

Chair: You are officers of the court.

Gareth Brahams: Of course, that is subject to our professional obligations. If your professional obligations are not clear, your obligation is to act in the best interests of your clients until such a point as you are breaching your professional obligations. In fact, you would be breaching another professional obligation if you were not doing that. Where you get these difficult issues—Suzanne is right—you need very clear guidance as to what your position should be. (My emphasis)

28. Now in so far as this is attempting to state the professional rules it is, in my view, incorrect. And to be fair, Mr Brahams may have misspoken; giving evidence before a Select Committee is stressful. I should say,
however, having conducted a number of research studies, and training sessions, on lawyers' ethics with practising lawyers, that it is the kind of error that is made with some regularity.

29. What would an accurate portrayal of a solicitor's professional entail? The Solicitors' Code of Conduct requires solicitors to, “strive to uphold the intention of the Code as well as its letter.” And to apply the ten principles as “all-pervasive”. Those principles, include requirements to: uphold the rule of law and the proper administration of justice; act with integrity; not allow your independence to be compromised; act in the best interests of each client; provide a proper standard of service to your clients; and, behave in a way that maintains the trust the public places in you and in the provision of legal services.

30. Applying the Principles in an all-pervasive way means:

   You should always have regard to the Principles and use them as your starting point when faced with an ethical dilemma.

   Where two or more Principles come into conflict the one which takes precedence is the one which best serves the public interest in the particular circumstances, especially the public interest in the proper administration of justice. Compliance with the Principles is also subject to any overriding legal obligations.

31. This almost the reverse of the view presented to the Committee. There is only one way I can see in which the view expressed by Mr Brahams can be correct. That is, if in situations of doubt about how to apply professional rules, the public interest in the administration of justice always requires that the best interest of the client comes first. This would however render the ‘public interest test’ anachronistic and render a pervasive consideration of all the principles illusory. It is also an approach which is not at all nuanced.

32. There are a number of reasons for solicitors to prefer an approach which unequivocally puts the client first:

   32.1. it is usually in their commercial interests, but also often in the interests of justice, to align as fully as they can with their client’s interests;

   32.2. if they neglect their client interests there is the risk of being sued, whereas if they neglect the public interest in the administration of justice the risk is lower: it is rare for this neglect to be revealed, partly because where lawyer and client interests are aligned, partly because confidentiality protects the lawyer and the client from scrutiny, and enforcement is rare; and,

   32.3. ethical and tactical dilemmas, and the psychological burdens of practising law, are simplified considerably when it is only if there is a clear breach of law or professional ethics that a a
lawyer must restrain the imperative to act in their client’s interests.

33. The last point allows me to pick up a point left hanging above. Consider the hypothetical explanation for some of the tactics alleged in the Zelda Perkins case. When asked by Philip Davies, about whether he ever pushed back against a client asking for unreasonable things Mark Mansell acknowledged: “There are things that you can or cannot ask for...[And]... I would also advise a client if what they were asking for was not advisable, even if it was permissible.” As noted above, an interesting question is what the lawyer should do if the client declines to accept that advice. Suzanne McKie QC emphasised this was a current dilemma:

*Should the NDAs or the settlement agreements make it clear, in bold type: “Nothing in this agreement prevents you going to the police or regulatory bodies, or making a public interest disclosure”? I have had lawyers say to me in the last week, “What if your client, the company, does not want you to mention that? Is that a perversion of the course of justice, because we are keeping that exception out of the agreement?”*

34. Lawyers often see their client’s interests as paramount. The risk here is that, in situations of doubt, the lawyer sees themselves as bound to accept the client’s instructions on how to handle a case. This is, in my view, wrong. Under their professional principles they have an obligation to act with independence, and to consider their broader obligations to protect the rule of law and the administration of justice. They can and should take account of client’s legitimate interests when thinking about these issues, but they are not to see themselves as bound by the client’s views, or thereby absolved of responsibility for their decisions on the basis that they were just following the client’s instructions. Responsibility and judgment are axiomatic to professionalism and that judgment requires a rounded consideration of all the relevant professional rules and principles not just the client’s best interests. As Lord Chief Justice Judge remarked:

*Something of a myth about the meaning of the client’s “instructions” has developed. As we have said, the client does not conduct the case. The advocate is not the client’s mouthpiece, obliged to conduct the case in accordance with*

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19 *R v Farooqi* [2013] EWCA Crim 1649
whatever the client, or when the advocate is a barrister, the solicitor “instructs” him. ...That is the foundation for the right to appear as an advocate, with the privileges and responsibilities of advocates and as an advocate, burdened with twin responsibilities, both to the client and to the court.

35. This case was about criminal advocacy, but the words apply doubly in civil contexts, especially cases resolved away from the courts, where judges cannot exercise supervisory restraint.

36. As well as being wrong under the rules, a model of professional ethics which relies on treating the client interest as paramount risks practitioners making significant mistakes. Where lawyers, and/or their clients, have higher appetites for risk, and see uncertainty in the law as something to be taken advantage of, then problems are especially likely to ensue. To give some examples from beyond the world of NDAs: the recent Rolls-Royce Deferred Prosecution Agreement indicated that for commercial reasons contracts for bribes were characterised by their lawyers as high risk rather than forbidden;\(^{20}\) former Times Lawyer Alistair Brett’s was suspended from the solicitors’ profession for recklessly misleading the court about hacking in a case where he was trying to help the paper publish a scoop;\(^{21}\) two Allen & Overy partners were summoned before a Crown Court judge for potential contempt of court in a leading bribery case where they had been accused of pressuring prosecution witnesses;\(^{22}\) the SFO (and others) have expressed anxiety’s about how law firm independent investigations of target companies can inhibit investigation of serious fraud;\(^{23}\) leading firms were criticised for the ‘polishing’ of evidence in the Berezovsky v Abramovich litigation;\(^{24}\) and, Standard Chartered Bank were fined for wire-stripping of illegal financial transactions to avoid US sanctions – a scheme advised on, and possibly devised by, their in-house lawyers.\(^{25}\) All these cases have at their root in lawyers bending too far towards the interests of their clients. Nor is this simply a matter of a few hand-

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22 Caroline Binham, ‘Two Allen & Overy Lawyers at Risk of Probe over Dahdaleh Case’ (Financial Times, 26 March 2014) https://www.ft.com/content/b0e47460-b4dd-11e3-af92-00144feabdc0.

23 Frances Gibb, SFO takes on lawyer-client privilege in fight on fraudsters, The Times, February 5, 2015

24 Berezovsky v Abramovich [2012] EWHC B15 (Ch) (EWHC (Ch)).

picked examples. Cultures of independence are not well embedded in commercial practice as work by Steven Vaughan and Clare Coe shows.\textsuperscript{26}

37. Whether these examples are typical or not, they are evidence of a capacity of even elite lawyers to make significant, and sometimes catastrophic, errors of judgment because they fail to stand back and think about their broader professional obligations.

**Professional obligations and inhibiting disclosure to others**

38. For these reasons, it is my view that considerable work needs to be done to ensure appropriate rather than minimalistic professionalism. Basic understandings of the Code of Conduct are not well embedded within practising ranks. This needs to be addressed by stronger enforcement, better education, and improved training and management in law firms and in-house legal teams.

39. On NDAs, the Solicitors Regulation Authority have taken up the cudgels with some alacrity, issuing a Warning Notice quickly, partly in response to fears that solicitors firms, and their regulator, were about to be swept up in harassment scandals. That Warning Notice seeks to ensure that solicitors, “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.”\textsuperscript{27} Or, “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.”\textsuperscript{28}

40. In particular, they state their view that NDAs would be improperly used if they prevented or sought to impede or deter a person from: reporting misconduct, or serious regulatory breaches to responsible bodies; making a protected disclosure under the Public Interest Disclosure Act 1998; reporting an offence to a law enforcement agency; and, cooperating with a criminal investigation or prosecution. Or to, “use an NDA to influence the substance of such a report, disclosure or cooperation”\textsuperscript{29} Other elements, notably preventing a party holding a copy of the agreement, are also prohibited.

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\textsuperscript{28} Ibid.

\textsuperscript{29} Ibid.
41. It may be worthwhile considering some of the other types of NDA clause which may give rise to problems under the guidance.

**Clauses that are void and clauses that might be void**

42. I understand that employment lawyers sometimes include clauses in NDAs which are, or are suspected to be, void. They do so, as I understand it, to deter behaviour which they have, in law, no right to deter. This is an area which is not clearly covered in the SRA Warning Notice.

43. To my mind, where clauses are included which are known to be void the situation is straightforward. They should be seen as breaches of professional conduct. If they are claiming or implying a right to do something in an agreement that they know to be void, then they risk misleading anyone subject to or interested in that agreement: it breaches a solicitor’s obligation not to take unfair advantage of third parties under O(11.1).

44. And in my view this breaches the professional principle of integrity. As the Court of Appeal recently opined:

> “[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.”


45. Including void clauses asserting or creating (void) rights is analogous to making a claim in litigation which one has no right to make – behaviour already clearly frowned under the SRA Code of Conduct (see below).

46. A more difficult situation to judge is where a clause is included in an agreement in the knowledge that it may or may not void. Here is an example of a situation where one would probably need to rely on professional judgement, with a solicitor properly balancing their professional principles. Take clauses which seek to inhibit disclosures to third parties involved in litigation (e.g., a third employee of Miramax who brought a claim against them). The SRA’s Warning Note does not clearly warn against those. Such inhibitions, whilst they might be regarded as less serious, may have the potential to alter the course of justice and might also amount to an offence, or otherwise being contrary of the administration of justice. But the situation is not as plain as it is with disclosures to the police. Perhaps there are situations where such disclosures can legitimately be inhibited and perhaps there needs to be discretion for parties to negotiate such restrictions with due regard to professional principles and the facts of each case. 31


31 I think there are arguments both ways on this point, and do not want to lengthen this overlong submission by considering them in depth.
Unfair advantage in negotiation

47. A second example of where some strengthening of the Warning Notice might be contemplated is the idea of taking unfair advantage but ultimately it may be best also to leave significant discretion. The Solicitors’ Code of Conduct indicates that under Outcome (11.1) a solicitor is required not to: “take unfair advantage of third parties in either your professional or personal capacity.”

48. Outcomes are binding, and the wording here does not refer to whether a party is represented or not. One of the Indicative Behaviours (essentially examples of breaches of the outcome) include references to, “IB(11.7) taking unfair advantage of an opposing party’s lack of legal knowledge where they have not instructed a lawyer,” and, “IB(11.8) demanding anything for yourself or on behalf of your client, that is not legally recoverable, such as when you are instructed to collect a simple debt, demanding from the debtor the cost of the letter of claim since it cannot be said at that stage that such a cost is legally recoverable,” and, “IB(11.9) using your professional status or qualification to take unfair advantage of another person in order to advance your personal interests.”

49. The SRA’s Warning Notice has made it clearer, if not necessarily clear, that unfair advantage can be taken of represented parties, by suggesting that, “Where the employee is not represented, your obligations will be heightened, to ensure that there is no abuse of position, or unfair advantage taken.”

50. It would be difficult, if not impossible, for the SRA to legislate in advance for all the possible meanings of unfair advantage. Equally, practitioners struggle with their ethical obligations when acting against an unrepresented party (worrying about an inherent unfairness to their client if they are seen to be helping their opponent); so are likely to find doubly problematic the risk of being seen to be ‘soft-pedalling’ with a represented opponent. And practitioners are accustomed to the idea that they are not obliged to correct the mistakes of their opponent; although they must bring to the court’s attention legal authorities their opponent should have brought up which will help their opponent.

51. The A&O Simons Muirhead Burton (SMB) negotiation is a case in point. Was it for A&O or SMB to ensure the agreement was fair to Zelda Perkins? How far should a judgment on this reflect concerns about SMB’s decision, as alleged, to send in a two year PQE to negotiate with a sizeable team from A&O and Miramax. If the evidence is correct, agreeing to turn over some of one’s attendance notes, the way in which the client not the lawyer seemed to be leading the negotiation, and the (apparent) failure to explain or challenge terms which appear excessive all give rise to concerns about the quality of Zelda Perkins’s representation during the negotiation. Even so the conduct of those

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32 SRA Warning Notice, n. 26
negotiations may nonetheless amount to taking unfair advantage. After all, one does not escape responsibility for throwing a punch by arguing one’s opponent should have moved their head.

52. The SRA might be able to improve matters by making some basic things clear about unfair advantage, e.g. that the rule against taking unfair advantage applies to both represented and unrepresented parties, but it probably cannot legislate for all the potential permutations of unfair advantage, even within the context of NDAs. They have to rely on lawyers applying their discretion to the situation, but that discretion will only work if those lawyers do so with full regard to their professional obligations.

53. Put another way, whilst several witnesses pleaded for more or better guidance on perverting the course of justice, and professional obligations, they cannot rely on the absence of that guidance as a reason for not thinking authentically about the obligations they owe beyond their client’s interests.

**SRA Warning Notice – impact and evaluation**

54. A final point to be made about the Warning Notice is that there should be some encouragement for the SRA to consider and report on its impact as well as perhaps refine the content of the Notice and considering whether any lessons should be carried into the redrafting of the Code of Conduct. The Committee might ask the Legal Services Board to oversee a request to do that.

**How lay people interpret legal documents and processes**

55. I was not surprised to hear how Zelda Perkins interpreted her NDA as being even more onerous than it was, nor am I surprised to hear of her worry that breaching the NDA might land her in jail. Those researching the justice system are familiar with lay participants in civil and family justice assuming that they are at risk of prison when they are not.

56. Similarly, as well as bearing in mind the vulnerability of such individuals to power imbalances, it must also be remembered how difficult it can be for them to engage with complicated and legal language.

57. Lawyers need to be actively discouraged from deploying the ‘exclusion clause’ approach to the problem to excessive NDAs. This is the approach where an agreement seeks to mark out an exclusion of someone’s right and then makes allowance for ‘not affecting your statutory rights’. Or to make the example relevant here: an agreement prohibits disclosures of information broadly and then says, but of course “this does not effect your right to make protected disclosures”. Lawyers may understand the implications of two statement competing in this way, but ordinary readers, especially those without knowledge of whistleblowing law, will not.
58. What I think is important is to have clear statements of what the agreement permits stating explicitly that, for example, NDA parties may report matters covered by the agreement to the authorities (police, regulators, and so on). And that the agreements clearly and concisely state the obligations in the agreement. This should be done in English as plain as possible. A positive step would be for practitioners, or practitioner organisations engaged in the field, to engage in user testing of such agreement drafting on ‘ordinary’ employees to see what they understand the clauses to mean.

59. I am told by some legal service providers that they typically write their correspondence with a reading age of eleven in mind. Writing clear, intelligible, and specific agreements that reflect the individual circumstances of each case is a major challenge, but it is one that lawyers should be asked to face up to if they are serious about their agreements fairly governing behaviour.

Other issues

60. There are other ethical issues which I would like to emphasise should be borne in mind when lawyers are thinking about NDAs.

60.1. As well as the question of NDAs being used to cover up wrongdoing externally, there may be an internal issue also being ‘managed’. Lawyers engaged in NDA drafting need to understand the context within which they are working, and also – when dealing with organisations - who their client is. As a minimum, in situations where cases reveal significant allegations of wrong doing there needs to be adequate certainty that the right individuals or corporate organs (e.g. the CEO, the Chair, the Board) understand the seriousness of allegation. Wrongdoing also needs to be properly investigated. Instructions should ordinarily be taken separately from, and independently of, the alleged perpetrators.

60.2. The suggestion in the Zelda Perkins NDA that clients should ask lawyers to sign NDAs for the benefit of third parties before giving advice is a very surprising one. In the main I do not think lawyers would agree to it: such agreement would curtail their independence and their ability to act in the client’s best interests. It could be made clear that such clauses should not be permitted as de facto this would inhibit the ability of the party to get proper advice.

61. A tightening of professional guidance, and associated enforcement and improvement in training and management for professional ethicality, is only part of the solution to ensuring lawyers take a more rounded view of their professional obligations. One matter to which consideration could and should be given is better aligning client and lawyers incentives to respect the law in this area. Commenting in detail on this area is beyond my comfort zone, as I do not have sufficient knowledge of employment law: but requiring that clients pay compensation for the imposition of clauses drafted by their lawyers which are subsequently
found to be void or excessive might align lawyer and client interests in behaving with propriety.

April 2018