Allegations & NDAs

Should lawyers be required by regulators to refuse to participate in NDAs in relation to allegations of sexual misconduct? John Gould investigates

Complaints against the former TV personality Russell Brand are just the latest of almost daily allegations of sexual misconduct against celebrities producing high levels of publicity. Whatever the rights and wrongs of any case, the issue of when and how allegations emerge is an important one. Often sexual criminals have been able to cover up their wrongdoing but reputations have also been tarnished by the publicity around false allegations. Recently the Legal Services Board closed its call for evidence on the role of lawyers' conduct in the misuse of non-disclosure agreements (NDAs). The Bar Council has attracted trenchant criticism from those who campaign for legal restrictions to the use of NDAs for the evidence it submitted.

The controversy centred on the role of lawyers and legal regulators in preventing the perceived misuse of NDAs by clients. Should lawyers be required by regulators to refuse to participate in NDAs in relation to allegations of sexual misconduct even if perfectly lawful? What other areas of lawful client activity might regulators think are so against the public interest that lawyers should be required to refuse to act or risk being disciplined?

The Bar Council believes that if NDAs are to be restricted, it should be done by law rather than denying access to lawyers. There are various provisions, such as a requirement not to give evidence or make public interest disclosures, which would be legally unenforceable. Confidentiality obligations may add little to existing employment contracts and obligations not to defame may be no more than a reminder of the general law. Public interest disclosures have been protected since 1998. This is not a law free zone.

From the regulation perspective there are two issues of principle. Firstly, to what extent should the freedom of clients to act in a lawful way be restricted indirectly by regulators curtailing their ability to obtain legal advice and representation and, secondly, can solicitors be guilty of misconduct simply by acting in circumstances in which the client's own ethical standards permit anything which is not actually illegal. The SRA clearly feels that the possible role of lawyers in the misuse of NDAs by some clients to cover up sexual misconduct remains a priority. In August the SRA published a 'Thematic Review: The use of Non-Disclosure Agreements in workplace complaints'. The review followed up on a Warning Notice by the SRA in March 2018 (updated November 2020). The warning itself followed what the SRA had identified as 'widespread concerns that non-disclosure agreements (NDAs) were being used improperly to prevent employees reporting unacceptable conduct, such as allegations of sexual harassment'.

In the SRA's view, these concerns arose from the scrutiny triggered in large part by the NDAs employed by disgraced and imprisoned US film producer, Harvey Weinstein, and the high profile work of the parliamentary Women and Equalities Committee. As a result of the SRA warning, the review found that the number of reports of improper use of NDAs increased not only in the context of sexual misconduct but also in relation to discrimination and criminality. It is fair to assume that before 2018 such reports, if they existed at all, were at a very low level.

The key element of the initial concern was that men, who abused a position of power to take sexual advantage of women, could preserve their ability to continue such misconduct by buying the silence of their victims underpinned by contractual confidentiality provisions and enforced by threats of unequal litigation.

Giving a warning to legal professionals about this was a fairly indirect approach. If Weinstein were Goliath and the SRA David, its warning slingshot contained gravel to spray over the servants of the Philistines rather than a giant-killing rock. A particularly striking feature of the warning was the extent of the responsibility it envisaged for a solicitor to protect the interests of another solicitor's client. The warning had the potential to cut across the pattern of potentially competing professional duties carefully developed by the courts over a very long period. From even before the days of Cicero, opposing lawyers have each had regard for the interests of their own client, not their client's adversary or their lawyerly view of the client's ethics or the interests of the public at large. A requirement to consider fairness to another solicitor's client suggests a solicitor's professional duty to their client's opponent goes beyond their legal duty of care or their obligation not to engage in sharp practice by personally taking unfair advantage of someone in a way which demonstrates a lack of integrity.

A second problem is that it is difficult to tie the SRA's requirements to specific rules of professional conduct.

The warning refers to four principles and four code of conduct stipulations. There is nothing intrinsically inimical between confidentiality obligations and the rule of law or the administration of justice (principle 1). Contractual obligations are, in fact, part of the rule of law. It is possible that NDAs could feature in behaviour which amounted to a criminal offence such as bribing a witness to withhold their evidence—such an agreement would be unenforceable and be very likely to involve misconduct. Failing to uphold public trust and confidence (principle 2) requires some substantive misconduct rather than generalised public concerns. Independence (principle 3) and integrity (principle 5) are important but not specific.

By the Code of Conduct for Solicitors, a solicitor must not abuse their position by taking unfair advantage of clients or others (paragraph 2 of the code). For a breach there must be an abuse of position and an advantage taken of someone which is unfair. Although the paragraph applies to both clients and others, the test of unfairness must

be very different for clients on the one hand and others. A solicitor is not entitled to 'take advantage' of their own client at all but rather has a positive duty to obtain an advantage even if it is to the detriment of others. It is not clear that a solicitor has a 'position' in relation to a third party which can be abused at all and the circumstances of unfairness to an independently represented opponent must be rare.

The obligation to cooperate with the SRA or other regulators (paragraph 3 of the code) adds very little to the obligation in paragraph 7.5 not to attempt to prevent anyone from providing information to the SRA or other regulators. There is no obligation to report a client's bad behaviour to the SRA. In some circumstances the requirement to report breaches of regulatory arrangements (paragraph 7.7) could be relevant in an indirect way depending on what another solicitor was doing.

In its warning the SRA glossed these provisions into a statement of 'expectations'. The relationship between individual expectations and specific principles and the code was not spelt out other than in relation to paragraph 7.5. The expectations generally relate to the use of an NDA for an improper purpose. Since many of the expectations relate to obligations which would be unenforceable anyway, the assertion of obligations which are known to be unenforceable may well be the most significant example of the misuse of NDAs. It seems that the SRA would like to go further and require solicitors to add commentary into obligations describing the limits of enforceability presumably to mitigate the risk that the opposing side will fail to make the limits of enforceability of general obligations sufficiently clear not to act as a deterrent to lawful disclosures.

Even without the warning, solicitors might have been expected to apply some simple principles. Solicitors should not draft or agree clauses which purport expressly to impose obligations which: are part of the commission of a criminal offence; prohibit a disclosure under the Public Interest Disclosure Act 1998; obstruct the administration of justice or prevent reports to regulators or the police. Solicitors should not threaten proceedings to exert pressure unless there is an arguable basis for bringing a claim.

In the context of settling employment claims, a binding settlement will require independent advice and certification. In other cases, where there is a risk of an abuse of power, independent advice is required and, in an exceptional case, a solicitor might decline to act if the other side were not properly represented because the risk of an unfair advantage being taken against an unrepresented opponent was too great. Since the Public Interest Disclosure Act 1998 it has been best practice expressly both to exclude public interest disclosures and even before that to exclude disclosures required by law. It is worth restating that the very reason for separate and independent representation is because a solicitor cannot advise or look after the interests of both parties. That itself would be misconduct.

Dealing with the whole context of sexual misconduct allegations certainly requires fact specific consideration of the circumstances and the risk to both clients of settlements which involve oppressive behaviour or pressure. The basic principle, however, must be that each solicitor should look after their own client. An NDA which serves to stop allegations may be against the public interest where the allegations are true but still in the interests of both parties. Are the solicitors of both parties to judge the truth of the allegations and stop each of their clients from preferring their own interests to that of potential future victims?

Take an hypothetical example: T is a powerful, high profile and very rich businessman who has publicly supported 'family values'. V, an employee, claims to be a victim of sexual misconduct by T in the past, which T vehemently denies. V instructs specialist lawyers and T offers V a settlement of £1m if she does not repeat the (as he claims) false allegations or disparage him. T believes that publicity around allegations, even if eventually proved to be false, would cost him many millions of pounds in lost business and permanently damage his reputation. Without those clauses T will only pay £10,000 to save the time and expense of a claim which he is confident will fail. V is advised that the settlement is far in excess of what she could recover by pursuing a successful claim and is very keen to accept. V tells her own lawyer that she believes there are other victims against whom T may have committed serious sexual assaults but has not herself been victim of a criminal assault. V tells her lawyer that she believes that T may offend again. T instructs a solicitor to document the deal with V's lawyers. T's lawyer produces a draft including standard confidentiality obligations excluding public interest disclosures but including a non-disparagement clause. There is no mention of reports to the police. T instructs his lawyer to warn V's lawyer that if she defames him after settlement he will sue and she will be in breach and may have to repay him. V's lawyers advise her that she has no legal obligation to make a report to the police and she has never intended to do so.

How would the longstanding principles and the warning apply to the conduct and advice of the two solicitors? Should one or both of the lawyers refuse to act if their instructions remain the same? Should T's lawyer look to go beyond V's lawyer's certificate on the settlement agreement of independent advice and insist on including express recitals of the limits of enforceability by their own client in the agreement?

Five years have now passed since the original warning, Weinstein-type behaviours are still a major concern and the question of the role of lawyers in facilitating abuse is unresolved. NDAs are very likely to be having the effect of covering up serious allegations. The review suggests that lawyers are not actually misconducting themselves on any scale in relation to NDAs.

The review found that most NDAs complied with the requirements of the SRA's warning notice and that, in fact, there was no direct evidence of solicitors drafting NDAs with the deliberate intention of preventing reporting inappropriate behaviour. The review cautioned against 'inadvertent contributions to common trends or practices' which seems more like an educational insight than any sort of evidence of professional misconduct.

The review criticised solicitors for not being sufficiently aware or trained on the practices the SRA favours to mitigate the risk that standard clauses might be misunderstood by employees and thereby deter the kind of things which, if expressly forbidden, would be objectionable. The SRA would like to see more specific evidence on files of advice on NDAs, more training on recognising vulnerable clients and more amendments to templates. All of this may be either sensible or regulatory overreach depending on your point of view, but they are not deficiencies amounting to professional misconduct.

It might be thought that, in the absence of any evidence of wrongdoing, it was difficult to accuse solicitors of complacency for not regarding the facilitation of NDAs as being a general problem, but the most surprising assertion in the review comes at the end:

> 'Solicitors must acknowledge the ethical considerations that should be considered when advising clients on NDAs (regardless of which party they represent). This includes when using NDAs within their own practices.'

One might ask, if not the rules of professional conduct and the law, whose 'ethical considerations' applying to clients should solicitors have in mind? NLJ

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